(22,972.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 896.

LEVI B. GRITTS, RICHARD M. WOLFE, AND FRANK J. BOUDINOT, APPELLANTS,

vs.

WALTER L. FISHER, SECRETARY OF THE INTERIOR, AND FRANKLIN MacVEAGH, SECRETARY OF THE TREASURY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 2311.

LEVI B. GRITTS et al., Appellants,
vs.
WALTER L. FISHER, &c., et al.

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a Supreme Court of the District of Columbia.

No. 29926. Equity.

LEVI B. GRITTS, RICHARD M. WOLFE, and FRANK J. BOUDINOT, for Themselves and for and on Behalf of all Cherokees Enrolled for Allotment as of September 1, 1902, under the Act of Congress Approved July 1, 1902, Plaintiffs,
vs.
WALTER L. FISHER, Secretary of the Interior, and FRANKLIN MACVEAGH, Secretary of the Treasury, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 Filed May 17, 1911.

In the Supreme Court of the District of Columbia.

No. 29926. Equity.

LEVI B. GRITTS, RICHARD M. WOLFE, and FRANK J. BOUDINOT, for Themselves and for and on Behalf of all Cherokees Enrolled for Allotment as of September 1, 1902, under the Act of Congress Approved July 1, 1902, Plaintiffs,
vs.
WALTER L. FISHER, Secretary of the Interior, and FRANKLIN MACVEAGH, Secretary of the Treasury, Defendants.

Amended Bill of Complaint.

To the Supreme Court of the District of Columbia, Holding an Equity Court:

Come now the plaintiffs, by leave of the Court first had and obtained, and file this their amended Bill of Complaint, as of May 13, 1911.

The plaintiffs, for themselves and for and on behalf of all other persons enrolled for allotment as of September 1, 1902, under an act of Congress known as the Cherokee Agreement (32 Stat., 716) entitled "An Act to Provide for the Allotment of the Lands of the Cherokee Nation, for the Disposition of the Townsites Therein, and For Other Purposes," respectfully show:

1. That the plaintiffs are, one and all, of lawful age, citizens of the United States, residents of the State of Oklahoma, Cherokees
2 by blood, and enrolled for allotment as of September 1, 1902, under the Cherokee Agreement, being the Act of Congress approved July 1, 1902, and above entitled.

The plaintiffs are also members of the Keetowah Society, a corporation whose membership comprises many thousands of persons, all of whom are Cherokees by blood, and all of whom are enrolled for allotment as of September 1, 1902; plaintiff Richard M. Wolfe is the President of said Society, and is expressly authorized by resolutions of said society, to bring this suit in connection with two other persons to be selected by him; and he has selected his co-plaintiff, Levi B. Gritts, who is the Secretary of said Society, and his co-plaintiff, Frank J. Boudinot, who is the attorney for said Society, by the authority of said resolution. Copies of the Articles of Incorporation of the said Keetowah Society and of the Resolutions adopted by the advisory committe thereof are attached hereto as exhibits A and B respectively and it is prayed that they will be taken and considered as a part of this bill.

2. The defendant Walter L. Fisher is the Secretary of the Interior of the United States, a resident of the District of Columbia, and is sued herein as such Secretary of the Interior; the defendant Franklin MacVeagh is the Secretary of the Treasury of the United States, a resident of the District of Columbia and is sued herein as such Secretary.

3. That by virtue of an agreement by and between the United States and the Cherokees, proposed by the United States on July 1, 1902, in the form of an Act of Congress (32 Stat. 716), ratified, accepted and agreed to by the Cherokees by popular vote on August 7, 1902, duly and publicly proclaimed on August 12, 1902, by the proper officers of the United States and the Cherokees, the members of the Cherokee Tribe living on September 1, 1902, became on that date equal owners of all the property of the Cherokees, both
3 lands and funds, theretofore owned by them as a community, with individual estates of inheritance therein, comprising about four and a half million acres of land, and about two million dollars in funds deposited in the Treasury of the United States.

4. In accordance with the provisions of the said agreement all the members of the said tribe living on September 1, 1902, numbering about 36,000, including plaintiffs herein, were duly enrolled, and thereupon each became entitled to an equal distributive share of all said lands and funds, to the exclusion of all other persons whatsoever, and especially of any child born after September 1, 1902.

The pertinent paragraphs relating to said enrollment are as follows:

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen, since the sixteenth day of December, eighteen hundred and ninety-five shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of Section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes page two hundred and twenty-one).

SEC. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior, lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of
4 the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commission of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: Provided, That no allotment of land

or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such persons shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of anyone on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto to a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained."

5. By the terms of said agreement between the Cherokees and the United States it was provided that the defendant, the Secretary of the Interior, should supervise and direct the appraisement, allotment and distribution of all of said lands and funds to the persons enrolled according to the terms of said agreement, and the allotment or distribution of any of such lands or funds, or other property, to any persons other than those so enrolled, and especially to any child born after September 1, 1902, was thereby expressly prohibited.

5 By the said agreement it was also provided that to each of the said persons enrolled as of September 1, 1902, there should be given an allotment of land equal in value to one hundred and ten acres of average allot-able lands, the same to be selected by him, or by his legal representative, and also that in the event any individual so enrolled should die after September 1, 1902, and before receiving his said allotment, such allotment, together with his proportionate share of all the other property, lands and funds, should descend to his heirs.

The pertinent paragraphs are as follows:

SEC. 9. The lands belonging to the Cherokee tribe of Indians in Indian Territory, except such as are herein reserved from allotment, shall be appraised at their true value: Provided, That in the determination of the value of such land, consideration shall not be given to the location thereof; to any timber thereon, or to any mineral deposits contained therein, and shall be made without reference to improvements which may be located thereon.

SEC. 10. The appraisement, as herein provided, shall be made by the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior.

SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one

6 hundred and ten acres of the average allot-able lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

SEC. 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands.

SEC. 58. The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this Act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate.

SEC. 59. All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States, in and to the lands embraced in his patent.

SEC. 64. The collection of all revenues of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under rules and regulations to be prescribed by the said Secretary.

SEC. 65. All things necessary to carry into effect the provisions of this Act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior.

SEC. 66. All funds of the tribe, and all moneys accruing under the provisions of this Act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

SEC 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this Act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable and he shall make all needed rules and regulations to carry this provision into effect.

7 SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this Act.

SEC. 12. For the purpose of making allotments and designating homesteads, hereunder, the forty-acre, or quarter of a quarter section, sub-division established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual

manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a section.

SEC. 70. Allotments may be selected and homestead designated for minors by the father or mother, if citizens, or by a guardian, or curator, or the administrator having charge of their estate, in the order named; and for prisoners, convicts, aged or infirm persons, and soldiers and sailors of the United States on duty outside of the Indian Territory, by duly appointed agents under power of attorney; and for incompetents by guardians, curators, or other suitable persons akin to them; but it shall be the duty of said Commission to see that said selections are made for the best interests of such parties.

SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas; Provided, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

The number of persons on said roll entitled to such allotment, and to pro rata shares of all other property, is about 36,000; and the number of possible allotments of 110 acres of average lands was about 40,000, so that the surplus, after providing an allotment of 110 acres for each person so enrolled, amounted to about 4000 allotments, equivalent to about 440,000 acres of said average lands.

The reasonable value of the said surplus lands is not less than
\$4,400,000. The funds in the Treasury, together with such
8 other sums as are to be added thereto, exclusive of any proceeds arising from the sale of said surplus lands, amount to about \$2,500,000.

7. The said agreement of July 1, 1902, by its terms, provided that the allotment of lands thereunder, and the distribution of other tribal property should be made upon the roll therein authorized, to include the names of all Cherokees entitled to enrolment and living on September 1, 1902, and none others, (Secs. 25-31) and the said agreement further provides that all things necessary to be done to carry into effect the provisions of the same should be done under the authority and direction of the Secretary of the Interior (Sec. 65), who is thereby charged with the making of said roll, the appraisement and allotment of the lands to be allotted thereunder, the disposition of all lands reserved from allotment, and of all surplus unallotted lands, and of all townsites belonging to the Cherokee people, and the distribution of all funds then owned by

the said Cherokees or such as might accrue under the provisions of said agreement. (Secs. 64-69.)

8. It is further made the duty of the said Secretary of the Interior, after such funds are collected, to cause the same to be paid out per capita to each individual entitled thereto, by an officer of the United States acting under the direction of the said Secretary of the Interior, (Sec. 66), after he, the said Secretary, has paid all just indebtedness of the Cherokee Tribe existing at the date of the ratification of the said agreement, to-wit, August 7, 1902, or which might be lawfully contracted thereafter before such final distribution of the said funds.

The said Secretary of the Interior is thereby further directed to make all needed rules and regulations for doing the same. (Sec. 67.)

9 9. Plaintiffs further show that by Section 16 of the Act of Congress of April 26, 1906, (34 Stat. 137) it was provided that after allotments had been made in accordance with the said act of July 1, 1902, the residue of lands remaining unallotted, and not reserved from allotment, should be sold by the Secretary of the Interior and the proceeds added to the fund in the Treasury of the United States; and by Section 17 of said Act it was provided that after the payment of just charges against said funds, the remainder should be distributed per capita, by the Secretary of the Interior, "to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls," and,

Plaintiffs charge that by the said acts of July 1, 1902 and April 26, 1906, they, and all others enrolled as of September 1, 1902, became the absolute owners of all the lands and all the funds formerly belonging to the Cherokees or to the Cherokee tribe, or to the Cherokee Nation, and it became the duty of the defendant, the Secretary of the Interior, after making allotments of lands as provided by the terms of the said Act of July 1, 1902, to those entitled to allotments thereunder, to convert the remainder of the unallotted lands and other property into money and add the same to the Cherokee fund in the Treasury of the United States, and after paying all just claims against the said fund, to distribute the remainder per capita to plaintiffs and all others on whose behalf this suit is brought, and their heirs, to the exclusion of all other persons.

10. The plaintiffs further show to the Court that the defendant the Secretary of the Interior, has decided to allot, and has allotted, and has decided to patent, and has patented, a part of the said surplus lands owned by plaintiffs and those on whose behalf this suit is brought, to one or more persons born since September 1, 1902, and that he, the said Secretary of the Interior, has decided to allot and has allotted, and has decided to issue and record patents, and has declared that he will issue and record patents, and is about to issue and record patents, unless enjoined and restrained by this Honorable Court, for all the remaining surplus lands owned

10 by plaintiffs, and those on whose behalf this suit is brought, to children born since September 1, 1902, and that the said defendant, the Secretary of the Interior, his assistants and subor-

dinate officials, have decided to distribute, and unless enjoined and restrained by this Honorable Court, will distribute a large part of the funds owned by plaintiffs and held in the Treasury of the United States, to said minor children born since September 1, 1902, all without plaintiffs' consent and in violation of their indefeasible property rights in the premises.

11. The plaintiffs further show unto the Court that the defendant, the Secretary of the Interior, is preparing to, and will, unless enjoined and restrained by this Honorable Court, order and direct the allotment of all the surplus lands owned by plaintiffs to 5610 children born after September 1, 1902, and is preparing to, and will, order the distribution of a large part of the funds in the Treasury of the United States, owned by plaintiffs, to the said minor children, without plaintiffs' consent, and in violation of their indefeasible property rights, and that the defendant Franklin MacVeagh, Secretary of the Treasury, upon the request and at the direction, of the Secretary of the Interior, is preparing to, and will, unless enjoined and restrained by this Honorable Court, pay out of the funds in the United States Treasury, owned by plaintiffs, a large sum of money to the said children; that the aggregate value of the lands and funds belonging to the plaintiffs and the other persons enrolled as of September 1, 1902, about to be so allotted and paid out to said children in violation of law, is about $1,000 to each of said children, making in all more than $5,500,000.

Plaintiffs specifically charge that they, and all those persons on whose behalf this suit is brought, became, by the said Act of
11 July 1, 1902, vested with an absolute and indefeasible right and title in and to all the lands and all the funds of the former Cherokee Nation, with individual estates of inheritance therein, as hereinbefore set out and that by the said act of July 1, 1902 the defendant, the Secretary of the Interior, was ordered and directed to allot to each person enrolled as of September 1, 1902, land equal in value to 110 acres of the average allottable lands of the Cherokee Nation, and by the said acts of July 1, 1902 and April 26, 1906, to convert all remaining Cherokee property into money and, after payment of all just charges against the fund, to distribute the remainder per capita to the said persons enrolled as of September 1, 1902, and their heirs; and that by the said proposed action of the said Secretary of the Interior, and Franklin MacVeagh, Secretary of the Treasury, they will be deprived of such property as remains unallotted and undistributed under the terms of the Cherokee Agreement of July 1, 1902, without due process of law.

That unless the defendants the Secretary of the Interior, and Franklin MacVeagh, Secretary of the Treasury be enjoined and restrained by writs of injunction to be issued out of this Honorable Court, the legal title to such surplus lands will become vested in said 5610 children and the said funds will be paid and distributed to said children to the irreparable damage and injury of plaintiffs, for which they have no adequate remedy at *large*, as in this bill of complaint hereinbefore more fully set forth.

12 The premises considered, plaintiffs pray:

1. That the writ of Subpœna may issue out of this Honorable Court, directed against the defendant Walter L. Fisher, Secretary of the Interior, and the defendant, Franklin MacVeagh, Secretary of the Treasury, commanding and requiring them, and each of them, to be, and appear, in this Honorable Court on some day certain, to be named therein, to answer fully the exigencies of this bill (though not under oath, answer under oath being hereby expressly waived) and to abide by and perform such orders or decrees as may be herein passed.

2. That a preliminary writ of injunction, or rule to show cause why a writ of injunction should not issue, be issued to the defendant Walter L. Fisher, Secretary of the Interior, enjoining and restraining him, his servants, agents, employees or assistants, or any of them, from proceeding to allot any lands lying within the Cherokee Nation, to any child born since September 1, 1902, and from delivering, causing to be delivered, or permitting to be delivered to such child any allotment certificate, allotment deed, patent, or other evidence of title to, or for, any such land; and enjoining and restraining defendant Walter L. Fisher, Secretary of the Interior, and defendant, Franklin MacVeagh, Secretary of the Treasury, or either of them, their servants, agents, employees or assistants, from proceeding to pay to any child born since September 1, 1902 any of the funds belonging to the members of the Cherokee Tribe of Indians, and credited to the Cherokee Nation on the books of the Treasury Department of the United States.

3. That upon final hearing, such writs of injunction or temporary injunction, as shall issue from this Court herein against the said defendants, or either of them, be made perpetual, and the plaintiffs be adjudged and decreed to be the sole and exclusive owners of all the property, real and personal, owned by the members
13 of the Cherokee Tribe on September 1, 1902, except such lands as have been allotted since the said date to persons enrolled in strict accordance with the provisions of the said act of July 1, 1902 (32 Stat. 716) and except such funds as may have been paid out and disbursed in strict accordance with the terms and provisions of the said agreement of July 1, 1902.

4. That a mandatory injunction issue to defendant Walter L. Fisher, Secretary of the Interior, commanding, directing and requiring him to cancel, annul and destroy all allotment certificates, allotment deeds, patents or other evidences of title made, executed, or recorded for any lands within the Cherokee Nation in favor of any children born since September 1, 1902.

5. Further, that a mandatory injunction issue against defendant Walter L. Fisher, Secretary of the Interior, commanding, directing and requiring him to proceed to sell and dispose of all Cherokee lands reserved from allotment by the terms of the said Cherokee Agreement, all the surplus allottable lands of the Cherokee Nation remaining after allotments have been made to all Cherokees living on September 1, 1902, and entitled to allotment under the terms of the said agreement, and that he, the said defendant, be further commanded,

directed and required to pay into the Treasury of the United States, to be added to the Cherokee funds, all sums of money derived from the sale of such lands and any other Cherokee property which it is his duty to so dispose of under existing law.

6. That the defendant Walter L. Fisher, Secretary of the Interior, and the defendant Franklin MacVeagh, Secretary of the Treasury, be commanded, ordered and required to proceed, immediately after the proceeds of the sale of all unallotted and unallottable Cherokee property have been deposited in the Treasury of the United States and added to the fund already standing to the credit of the Cherokee Nation, to pay out and distribute per capita, all such moneys to plaintiffs and all other Cherokees enrolled under
14 the said Cherokee Agreement of July 1, 1902, and their heirs, in strict accordance with the provisions thereof.

And the plaintiffs pray for such other and further relief as to this Honorable Court shall seem agreeable to equity and good conscience.

LEVI B. GRITTS,
RICH'D M. WOLFE,
FRANK J. BOUDINOT,
Plaintiffs.

WM. H. ROBESON,
DANIEL B. HENDERSON,
JOHN J. HEMPHILL,
C. C. CALHOUN,
Attorneys for Plaintiffs.

DISTRICT OF COLUMBIA, *ss:*

Frank J. Boudinot, being first duly sworn, upon oath deposes and says, that he has read the foregoing amended Bill by him subscribed, and knows the contents thereof; that the matters and things therein stated upon his knowledge are true, and that those things stated upon information and belief he believes to be true.

FRANK J. BOUDINOT.

Subscribed and sworn to before me this 16th day of May A. D., 1911.

[SEAL.] FRANCIS C. NEUBECK,
Notary Public.

——— ———,
Notary Public.

15 EXHIBIT A.

Certificate of Incorporation of Keetoowah Society.

In the United States Court for the Indian Territory, Sitting at Tahlequah, in Special Term.

At Law. No. 592.

Ex Parte KEETOOWAH SOCIETY.

TAHLEQUAH, IND. TER., *Sept. 20th*, 1905.

Whereas, Rich'rd M. Wolfe, Dave Muskrat, Wolf Coon, Daniel Gritts, Frank J. Boudinot, J. Henry Dick, and others have filed in the office of the Clerk of the United States Court for the Northern District of the Indian Territory, at Tahlequah, their Constitution or Articles of Association in compliance with the provisions of the law with their petition for incorporation under the name or style of Keetoowah Society, they are, therefore, hereby declared a Body Politic corporate by the name and style aforesaid with all the powers, privileges and immunities granted in law thereunto pertaining.

Attest: Charles A. Davidson, Clerk of said Court of the Northern Judicial District of the Indian Territory, and Herbert C. Smith, Deputy Clerk and ex Officio Recorder.

[SEAL.] CHARLES A. DAVIDSON, *Clerk*,
By HERBERT C. SMITH,
Deputy Clerk and ex Officio Recorder.

16 *Constitution of the Keetoowah Society.*

Whereas, The Keetoowah Organization of the Cherokee Nation in General Convention assembled at Bug Tucker Springs, near Tahlequah, Indian Territory, on the 16th day of August, 1905, unanimously adopted the following, to wit:

Resolution No. 1.

"To provide for the incorporation of the Keetoowah Organization, adopted at a general convention of the Keetoowah Society held at Bug Tucker Springs on August 14, 15, 16, 1905."

"Whereas the dissolution of the Cherokee National Government as heretofore existing is provided for by subsisting laws of the United States to take place on the 4th of March, 1906, when the rights and interests of the members of the Cherokee Tribe, under treaties of the United States will be without any adequate means of protection, and

Whereas, the Keetoowah Society has existed as a patriotic organization from time immemorial and it is important that some steps shall be taken at this time to provide a means for the protection of

the rights and interests of the Cherokee people in their lands and funds, and to close up all business relations with the United States Government, including claims for the failure of said Government to fully perform all its treaty obligations with the Cherokees, and

Whereas, this cannot be provided for except by the creation of a body politic with the capacity and power to bring suits in the United States Courts.

Therefore, be it resolved by the District Captains of the Keetoowah Organization of the Cherokee Nation; that the Head Captains of this Organization be and they are hereby authorized and directed to take all needful steps that may be required under existing
17 law to incorporate members of the Keetoowah Organization into a body politic, and said Head Captains shall have full and complete authority to do all and everything necessary to be done in the premises," and

Whereas, those parts of the Keetoowah Constitution, with the preamble thereto, which were adopted on the 29th day of April, 1859, and which are deemed applicable to present conditions are as follows, to wit:

Statement.

"The Keetoowah Society began its organization on April 15th, 1858. A small number of men got together and discussed the affairs of the Cherokee Nation, with a view to the final result caused by the existing state of affairs of the United States. The people of the United States were divided and it was clear they were about to fight, and the Cherokee Nation being situated far in the South, and the men were becoming reckless and taking sides with the South, but the leading cause was the slave owners.

It was plain to be seen that the people without a full understanding were taking sides with the South. It was plain that the Missionaries sent from the North were objected to and finally were forced out of the Cherokee Nation, believing if they were not here all the people would go South, but they were mistaken. These matters were already understood by the people and they knew what the result would be, they knew the relative number of the several states and knew they were entering into the Confederacy and knew their means of defense, knew the business followed by them. All these matters were well considered when it was determined to take the side of the North.

On April 15th, 1858, I was appointed to devise some plan that would be best and place us in control of the Government, and we fixed for the next meeting April 20th, 1858, and on that day
18 I submitted my report or draft of a paper I had written. Also made some remarks of explanation, all of which was in the dark of night and in the woods, the report was approved and declared to be the law.

We knew it would be acceptable to the people and we at once informed them and it was accepted all over the Cherokee Nation by secret lodges. The following year there was a general convention of

the several districts, and it was adopted there April 29th, 1859, and it appears on the opposite page.

BUDD GRITTS,
Head Captain of Keetoowah Society, Cherokee Nation.

1.

"The name of this secret organization shall be "The Keetoowah Society."

2.

"The object and purpose of this Society shall be to establish and promote a lasting tie of friendship, and for mutual protection of persons of the Society and their personal and national rights and for the preservation and perpetuation of the Cherokees."

3.

"The membership shall consist of persons of good repute and who are Cherokees by blood."

4.

"The officers of the Society shall be one Head Captain of the nine Districts, one Second Head Captain and one Third Head Captain to be elected by the Society and to hold their offices for life or during good behavior."

5.

"There shall be a Secretary, and a Treasurer, who shall serve during good behavior.

"There shall be three District Captains, 1st, 2d and 3d,
19 in each of the several districts to be selected by members of the Society in such District, who shall have supervision of the local lodges in their respective Districts, and who shall serve during good conduct.

"The Keetoowah Society shall meet every year in General Convention, on the 2nd Monday of August, at such place as shall be designated by the Head Captains."

Therefore, We, the Undersigned Head Captains, Interpreter, and Secretaries, Members of the Keetoowah Organization of the Cherokee Nation, trusting to the guiding influence of the Great Spirit, in whose care is the destiny of all peoples, for our mutual benefit and better protection, do ordain and establish this Constitution.

Article I. This organization shall be known as the Keetookah Society.

Article II. The general purposes and objects of this Society shall be to establish and promote a tie of friendship and provide for the mutual protection of its members in their personal liberties and in their common as well as individual property interests and rights; to promote among its members and the peoples with whom they associate habits of sobriety and industry; to establish schools and colleges for the education of its members in the useful sciences and arts, in Agricultural pursuits and Mechanical Trades; to promote literature, education, science, art, and bodily and mental health among its members.

Article III. The membership of the Keetoowah Society shall con-

sist of all persons citizens of the Cherokee Nation by virtue
20 of Indian blood who shall make application for membership and comply with this constitution and such by laws as may be ordained hereunder.

Article IV. The principal offices of said Keetoowah Society shall be located at Tahlequah, Indian Territory, but auxiliary offices may be established and maintained in such other places or place as shall be selected by the authorities of said society as in their judgment may be necessary.

Article V. The officers of this Society shall be the present Head Captain of the Keetoowah Organization of the Cherokee Nation, to-wit, Richard M. Wolfe, Head Captain; David Muskrat, 1st Assistant Head Captain, and Wolf Coon, 2d Assistant Head Captain, who shall be designated President, 1st Vice President and 2d Vice President respectively, together with the present Cherokee Secretary Daniel Gritts, English Secretary Frank J. Boudinot, and Interpreter J. Henry Dick, who shall hold in this society the same offices at present held by them in the said Keetoowah organization, and the President, 1st Vice President, 2d Vice President, Cherokee and English Secretaries and Interpreter, shall hold their offices during life or good behavior. In addition to the officers named above, whenever the business of the Society shall require it, there shall be appointed by the President in such manner as may be provided in the by laws, a Treasurer and such other officers, agents or employees as the necessities of the Society may demand, who shall hold their offices or positions for such terms, receive such salaries and give such bonds as shall be fixed by the proper authorities of the Society in accordance with the by-laws.

21 Article VI. For the purpose of raising money the Society shall have power:

First. To exact from its members a reasonable membership fee and dues payable at stated intervals to be fixed in its by-laws.

Second. It shall have power, upon request or appointment, to act as agent in the leasing or renting of lands, the collection of rentals thereon and to charge a reasonable compensation for such services.

Third. The Society shall have power to borrow money, and issue its notes or certificates of indebtedness therefor, and to secure the same by mortgage or deed of trust on any or all property of the Society.

Fourth. The Society shall also have power to raise money by the issue of debenture or other bonds, and to provide for the payment thereof with interest.

Fifth. It shall have power to buy, hold, rent and sell property, real and personal.

Sixth. In all cases where, in pursuance of the objects and purposes of the Society, it shall become necessary to proceed to collect any claim of a common or individual interest under any treaty, law or otherwise, it shall have power to charge and collect a reasonable compensation from the individual or individuals for whose benefit such services may be rendered.

Article VII. The affairs and business of the Society shall be conducted and controlled by a Board of Trustees consisting of the

President and two members of the Society to be appointed by the President to serve with him in that capacity for one year or until their successors are appointed or elected as shall be provided in the by-laws, provided, however, that whenever the membership of the Society shall become sufficiently numerous, the President
22 shall appoint three members, residents of each of the nine districts of the Cherokee Nation as now defined (in all 27 members) who shall constitute the Advisory Committee of the Keetoowah Society; and in the appointment of the members of the Advisory Committee, the President shall select the District Captains in the Keetoowah Organization of the Cherokee Nation if members of this Society.

Article VIII. Any officer holding an elective office of the Society and whose term of office is for life or good behavior, may be removed for cause by a two-thirds vote of all the members of the Advisory Committee, but no such officer shall be so removed until the charges against him are presented in proper form, and he is given an opportunity to be heard in his own defense; and all vacancies occurring in the offices of President, First and Second Vice President, Cherokee and English Secretary, Interpreter, or any other elective office for any cause, shall be filled by an election of the Advisory Committee at any general or special meeting held next succeeding the happening of the vacancy, at which a majority of the members of the Committee present shall be sufficient to elect if there be a quorum, and a quorum of such Advisory Committee shall be not less than fifteen.

ARTICLE IX.

Duties of Officers, Board of Trustees and Advisory Committee.

SEC. 1. It shall be the duty of the President to preside at all meetings of the Board of Trustees, the Advisory Committee, and all general Conventions of the Society; to have general supervision and management of the affairs of the Society and report to the Annual Convention of the Society the condition of its affairs, with his recommendation of changes, if, in his judgment any be needed.
23 SEC. 2. The First Vice-President shall perform the duties of the President in case he shall at any time be incapacitated to act for any reason.

SEC. 3. The Second Vice-President shall perform the duties of the President in case the President and First Vice-President shall both be incapacitated to act for any cause.

SEC. 4. The Cherokee Secretary shall be required to keep a complete record of all the proceedings of the Advisory Committee in the Cherokee language.

SEC. 5. The English Secretary shall in like manner keep a complete record in English of all the proceedings of the Advisory Committee.

SEC. 6. It shall be the duty of the Interpreter to attend all meetings of the Board of Trustees, and of the Advisory Committee, and to interpret the proceedings from English to Cherokee and from

Cherokee to English when required so to do, and whenever called upon to do so, to act generally as interpreter for the Board of Trustees or other officers when necessary in the transaction of any business of the Society.

SEC. 7. The Treasurer shall be the custodian of all moneys, and other things of value belonging to the Society, carefully keep the same, make disbursements, and disposition thereof as may be lawful under the by-laws of the Society.

SEC. 8. The Board of Trustees shall have full power and general control and management of the affairs of the Society, shall be in constant touch with the president and each other, and act without delay on all matters of business when presented.

SEC. 9. The Advisory Committee shall be the legislative body of the Society, and shall have power to legislate on all matters pertaining to the affairs of the Society, receive and act on reports and recommendations of the President, or acting President for the time being; to hear charges against any officer whose tenure of
24 office is for life, and by a two-thirds vote of all the members thereof, remove any such officer from office, to alter, amend, or repeal any by-law, and to propose and adopt amendments to this Constitution in the manner provided therein; and all the acts of said Advisory Committee, except impeachment of life officers, shall be subject to the approval of the President or acting President for the time being.

Article X. The Board of Trustees shall have power to ordain and establish all by-laws and regulations necessary to the control and management of the business of the Society, but they shall be subject to alteration, amendment or repeal by the Advisory Committee at any general or special meeting with the approval of the President or acting President for the time being.

Article XI. There shall be an annual meeting of the Society, to be held at such place as the President may designate, on the Second Monday of August of each year, and special meetings of the Advisory Committee shall be held whenever called together by the President; and this Society shall be deemed to be fully organized upon the signing of this Constitution by the officers named herein.

Article XII. This Constitution may be amended by resolution proposed at any general meeting of the Advisory Committee, which shall lay on the table until the next succeeding meeting of said Committee when it will be taken up and disposed of; and if passed by a two-thirds vote of the Committee and receives the approval of the President, it shall become a part of this Constitution.

RICHARD M. WOLFE,
President.
DAVE MUSKRAT,
1*st Vice President.*
WOLFE COON,
2*d Vice President.*

DANIEL GRITTS,
Cherokee Secretary.
FRANK J. BOUDINOT,
English Secretary.

25 TAHLEQUAH, OKLAHOMA, *February 6th*, 1911.

I, Richard M. Wolfe, President of Keetoowah Society, do hereby certify that the foregoing thirteen pages of typewritten matter contain a true and complete copy of the constitution of Keetoowah Society, including a certificate of incorporation.

Witness my hand officially on the day and date above written.

[SEAL.] RICH'D M. WOLFE,
President, Keetoowah Society.

26 EXHIBIT B.

Resolution No. 2.

Whereas, By acts of the Congress of the United States, approved on the 26th day of April, 1906, and June 21st, 1906, respectively, several millions of dollars worth of lands and moneys belonging to recognized citizens of the Cherokee Nation, are directed to be taken from the property owners thereof, without their consent, and distributed among about 5500 minor children, described in said acts of Congress, and

Whereas, It is the sense and firm belief of the Advisory Committee of Keetoowah Society, of the members of the Keetoowah Society in general, and, it is believed, of practically all citizens of the Cherokee Nation, that the distribution of lands and moneys to said minors, as proposed in said laws of Congress, would be in direct violation of the fourteenth and fifth amendments to the Constitution of the United States, in that, by such proposed distribution, the proper owners of said lands and moneys would be deprived of very valuable property without due process of law; and would be denying to said proper owners equal protection of the laws guaranteed by said Constitution, the said proper owners of said lands and moneys all being citizens of the United States, and

Whereas, the Commissioner to the Five Civilized Tribes, Honorable Tams Bixby, and the Secretary of the Interior of the United States, are about to carry said laws into effect and distribute the lands and moneys as therein provided, and

Whereas, Recognized citizens of the Cherokee Nation, namely, Messrs. Henry Eiffert of Fort Gibson, and Levi B. Gritts, Samuel Manus, Johnson Manning and Nick Comingdeer of Tahlequah, have already instituted legal proceedings in their own names and for and in behalf of all other recognized citizens of the Cherokee Nation, in the United States Court at Muskogee, Indian Territory,

27 to restrain said Commissioner from distributing the lands and moneys aforesaid amongst the minor children mentioned,

Now, therefore, Be it resolved by the Advisory Committee of Keetoowah Society that the President of Keetoowah Society be, and he is hereby, requested and directed to immediately take every necessary and proper step, and to do every proper and lawful thing, to prevent any person or persons whomsoever, and especially to prevent the minors enrolled under authority of said acts of Congress

approved April 26th, 1906, and June 21st, 1906, respectively, from in any manner and at any time participating in the distribution of any of the property of the Cherokees, other than citizens of the Cherokee Nation entitled to so participate and who were living September 1st, 1902, and to this end he may take steps to join in the suit alrady instituted, or act independently, or do both, as he may think best and most advisable; and the President of Keetoowah Society is hereby requested and directed to appoint two members of Incorporated Keetoowah Society to act with him and to assist and advise with him, and they three shall be known as the Executive Committee of Keetoowah Society. Said Executive Committee shall proceed at once to enter into a contract, in the name of the Incorporated Keetoowah Society, in their own individual names, in the names of all members of Keetoowah Society, and for and in behalf of all duly enrolled and recognized citizens of the Cherokee Nation entitled to participate in distribution of Cherokee lands and moneys, with some reputable attorney or attorneys to take all needful and legal steps before the Courts, Committees of Congress, or Executive Departments of the Government of the United States to prevent said minor children from receiving lands and moneys, or either, as proposed in said laws of Congress, and to bring suit, if necessary, against the Government of the United States to recover the full value of all lands or moneys wrongfully, or unconstitutionally, given to said minor children by its officers, whether
28 said officers claim to act by authority of Congress or not.

The said Executive Committee are hereby directed to contract with said attorney or attorneys to pay as compensation for his or their services and expenses rendered and incurred in the prosecution of the matters the subject of this resolution and to cover and include all services and expenses of any kind or character growing out of or incident to such prosecution, a sum equal to not exceeding fifteen per centum (15%) of the actual value of all property in lands and moneys saved to the real owners thereof. The payment of said fifteen per centum (15%) shall be contingent upon success and shall be in full for, and in lieu of, all services and expenses of every description rendered and incurred in connection with the subject of this resolution.

If deemed necessary, any contract, or contracts, made as provided above, shall be presented to the President of the United States for his approval.

Passed the Advisory Committee of Keetoowah Society this the 16th day of August, 1906.

LINCOLN ENGLAND,
Chairman.

N. J. REDBIRD, *Clerk.*

Approved:

RICHARD M. WOLFE,
President, Keetoowah Society.
DAVE MUSKRAT,
1st Vice President.
JIM HILDEBRAND,
2d Vice President.

Attest August 16th, 1906.

FRANK J. BOUDINOT,
English Secretary, Keetoowah Society.
LEVI B. GRITTS,
Cherokee Secretary, Keetoowah Society.

29 TAHLEQUAH, OKLAHOMA, *February 6th*, 1911.

I, Richard M. Wolfe, President of Keetoowah Society do hereby certify that the foregoing three pages of typewritten matter contain a true and complete copy of resolutions passed by the Advisory Committee of Keetoowah Society, and approved August 16, 1906.

Witness my hand officially on the day and date above written.

[SEAL.] RICH'D M. WOLFE,
President, Keetoowah Society.

30 *Demurrer of Franklin MacVeagh.*

Filed February 14, 1911.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 29926.

LEVI B. GRITTS et al.
vs.
RICHARD A. BALLINGER, Secretary of the Interior, and FRANKLIN MACVEAGH, Secretary of the Treasury.

Now comes the defendant, Franklin MacVeagh, Secretary of the Treasury, and showing to the Court that there is no equity in the bill of complaint, and that it does not appear from the averments thereof that the plaintiffs have any status, right, title or interest entitling them to the relief sought or to any relief whatsoever, and that it appears on the face of the said bill that this Court has no jurisdiction to grant the injunction prayed against this defendant, nor any jurisdiction over the subject-matter of the suit, does demur to said bill, and says that the same is bad in substance on the grounds, amongst others following:

1. That it appears on the face of said bill that this suit is virtually and in effect a suit against the United States.

2. That it appears on the face of said bill that this suit is a suit to procure an injunction against the United States, and as such not permitted by law nor within the jurisdiction of this Court.

3. That it appears on the face of said bill that this defendant is attempted to be sued herein as the Secretary of the Treasury of the United States, who has charge of and control of certain funds
31 and moneys in the Treasury of the United States, to which said funds and moneys the plaintiffs as individuals are not shown by the said bill to have any right, title or interest.

4. That it appears from the face of said bill that the plaintiffs have no right, title or interest in the unallotted land of the Cherokee nation or the funds in the Treasury of the United States of which the United States is a trustee for and on behalf of the Cherokee nation.

5. That in the said bill of complaint, an injunction is sought against the defendants, to restrain them from carrying out the terms and provisions of an Act of Congress relating to the subject-matter of which Congress has plenary jurisdiction and power, and concerning which the Courts have no jurisdiction to interfere.

6. For other grounds.

CLARENCE R. WILSON,
Attorney of the United States in and for the District of Columbia.
REGINALD S. HUIDEKOPER,
Assistant Attorney of the United States in and for the District of Columbia.

32 Filed February 15, 1911.

In the Supreme Court of the District of Columbia.

In Equity. No. 29926.

LEVI B. GRITTS et al.
v.
RICHARD A. BALLINGER, Secretary of the Interior, and FRANKLIN MACVEAGH, Secretary of the Treasury.

Demurrer.

Now comes the defendant, Richard A. Ballinger, Secretary of the Interior, and showing to the Court that there is no equity in the bill of complaint, and that it does not appear from the averments thereof that the plaintiffs have any status, right, title or interest entitling them to the relief sought or to any relief whatsoever, and that it appears on the face of the said bill that this Court has no jurisdiction to grant the injunction prayed against this defendant nor any jurisdiction over the subject-matter of the suit, does demur to said bill, and says that the same is bad in substance, on the grounds, amongst others, following:

1. That it appears on the face of said bill that this suit is virtually and in effect a suit against the United States.

2. That it appears on the face of said bill that this suit is a suit to procure an injunction against the United States, and as such not permitted by law nor within the jurisdiction of this Court.

3. That it appears on the face of said bill that it is sought thereby to control and interfere with the exclusive power and authority of Congress and of the Secretary of the Interior in the execution of

laws enacted by Congress, in the control and disposition of
33 the property of the Cherokee tribe or nation of Indians.

4. That it appears on the face of said bill that the plaintiffs have no right, title or interest in the lands of the Cherokee nation or the funds in the Treasury of the United States of which the United States is a trustee for and on behalf of said Cherokee nation, as to entitle them or any of them to maintain this action.

5. For other grounds.

OSCAR LAWLER,
Ass't Attorney General,
F. W. CLEMENTS,
First Ass't Attorney,
C. EDW. WRIGHT,
Assistant Attorney,
Attorneys for the Secretary of the Interior.

Service acknowledged Feb. 15, 1911.

JNO. J. HEMPHILL,
Per A. C. SCHUERMANN.

34 *Order.*

Filed March 22, 1911.

In the Supreme Court of the District of Columbia.

In Equity. No. 29926.

LEVI B. GRITTS et al., Plaintiffs,
vs.
RICHARD A. BALLINGER, Secretary of the Interior, and FRANKLIN MACVEAGH, Secretary of the Treasury, Defendants.

In this cause, it appearing to the court that the defendants, Richard A. Ballinger, has resigned his position as Secretary of the Interior, and that Walter L. Fisher is his successor in office, upon motion of the attorneys for plaintiffs, and by consent of the attorneys of Walter L. Fisher, Secretary of the Interior, given in open court, it is this 22d day of March, 1911, ordered that the said Walter L. Fisher, as Secretary of the Interior, be substituted in the place and stead of the said Richard A. Ballinger, and that this cause be maintained by the plaintiffs against the said Walter L. Fisher, in his official position as Secretary of the Interior.

WENDELL P. STAFFORD, *Justice.*

The above order consented to

OSCAR LAWLER,
F. W. CLEMENTS,
C. E. WRIGHT,
Att'ys for Def't.

35 Filed May 10, 1911.

In the Supreme Court of the District of Columbia.

No. 29926. In Equity.

LEVI B. GRITTS et al., Plaintiffs,
vs.
RICHARD A. BALLINGER, Secretary, et al., Defendants.

Opinion of the Court.

This case has been heard upon a demurrer to the bill, and will be disposed of without reference to any facts that have been brought upon the record by the return to the rule to show cause why a temporary injunction should not be issued, or otherwise. The plaintiffs rest their case upon the rights which they believe themselves to have acquired under and by virtue of the Act of Congress of July 1, 1902, 32 Stat. at Large, Chapter 1375, whereby they conceive themselves to be vested individually with property rights in certain lands and funds formerly belonging to the Cherokee Nation. They seek an injunction against the Secretary of the Interior to prevent him from disposing of such lands and against the Secretary of the Treasury to prevent him from disposing of such funds. Said Secretaries are proceeding and are about to proceed under a later Act of Congress to dispose of the said property to others, and the position of the plaintiffs is that said latter act is unconstitutional and void if and in so far as it attempts to authorize such disposition. The plaintiffs bring this bill in their own behalf and in behalf of all others having like interests. This in broad outline is the case presented by the bill, but it will be necessary to state the facts somewhat more particularly.

36

Before the passage of the Act of 1902 the title to the property in question was vested in the Cherokee Nation for the common use and benefit of all its members, subject of course, to the paramount authority of Congress. Cherokee Trust Funds, 117 U. S. 288; Constitution of the Cherokee Nation, Art. 1 Sec. 2. The individual members of the nation had no property rights therein that could be enforced by any legal proceedings. Cherokee Trust Funds, 117 U. S. 188, Stephens v. Cherokee Nation, 174 U. S. 445; Cherokee Nation v. Hitchcock, 187 U. S. 294; Cherokee Nation v. Journeycake, 155 U. S. 196. The United States in such circumstances deals only with the tribe or nation, not with the individual Indian as vested with property rights. Blackfeather v. U. S. 190 U. S. 368; Cherokee Trust Funds, 117 U. S. 288; Fleming v. McCurtain, 215 U. S. 56. The power of the United States to deal with the tribe or nation in respect of its tribal property cannot be questioned in the courts, the tribe or nation having no right to sue the United States without its consent. Consequently the power of Congress in dealing with the tribe or nation in respect to its property is supreme and unlimited except by its own sense of justice and duty towards them. Lone

Wolf v. Hitchcock, 187 U. S. 553; Conley v. Ballinger, 216 U. S. 84; Ligon v. Johnston 164 Fed. 670. Congress is not even bound to respect its own treaty stipulations with an Indian Tribe. If it disregards or breaks such a stipulation it cannot be called to ac-
37 count therefor in the courts, and the constitutionality of its act cannot even be tested in the courts. The Cherokee Tobacco, 11 Wall. 616; Ward v. Race Horse, 163 U. S. 504; United States v. McBratney, 104 U. S. 621.

Much was said in argument on behalf of the plaintiffs of the peculiar title by which the Cherokee Nation held its lands, and it was argued that its title was better than that of other Indian tribes in view of the history of the acquisition of the title and the terms of the treaties and acts of Congress relating thereto. But no matter what the title was which the United States had bestowed upon the Cherokee Nation in its political capacity, that title was not one that could be made the basis of an action in the courts against the United States or that could afford any standing ground upon which to contest the validity of an act of Congress dealing with the title. Thus much is clear from the cases already cited.

The Act of 1902 provided for an allotment of lands of the Cherokee Nation among the individual members of the nation. The Act was passed in response to a request from the nation. The stipulation in the treaty of 1866 had provided that upon such request the United States should at its own expense make such an allotment. But a request was not necessary. Congress could have made the allotment without any request; and could have ended the political existence of the Cherokee Nation with or without its consent. It chose to act upon the request, but its power was not limited thereby. The Act of 1902 provided that it should not be of any validity until it had been ratified at an election by the legal voters of the Cherokee Nation. Section 74. But this was a provision that might
38 have been omitted without affecting the constitutionality of the Act. The Act was ratified by the Cherokee Nation in accordance with this provision; but the constitutionality of the Act is to be tested without reference to this unnecessary provision.

From the foregoing premises it necessarily follows that if the plaintiffs have any vested interest in the lands and funds in question it is purely by virtue of the Act of 1902 itself, and because Congress intended by that Act to vest them individually with the title to such lands and funds. To determine this question it will be necessary to examine the Act with some care. It provided first for an appraisement of the lands belonging to the Cherokee tribe of Indians in Indian Territory, except certain lands that were reserved from allotment. Section 9. The appraisement was to be made by the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior. Section 10. The Commission was to allot to each enrolled citizen of the tribe, land equal in value to one hundred and ten acres of the average allottable lands of the Nation, liberty being allowed to each allottee to make his selection so as to include his improvements. Section 11. Each citizen was to be allowed to designate out of his allotment a certain portion as a homestead, and

this homestead was to be inalienable for a certain —prior and non-
taxable and not liable for debts contracted while so held by
39 him. Section 13. None of the lands allotted to citizens were
to be encumbered, taken or sold for debt, or to be alienated before the expiration of five years. Section 14. After ninety days from the ratification of the act it was to be unlawful for any member to enclose or hold possession of more lands in value than that of one hundred and ten acres of average allottable lands, and a breach of this provision was made a misdemeanor. Section 18. The roll was to be made up as of the first day of September 1902, and if any enrolled person died subsequent to that date and before receiving his allotment, the lands to which he would have been entitled were to be allotted in his name and to descend to his heirs together with "his proportionate share of other tribal property." Section 20. The Commission was to issue allotment certificates and these were to be conclusive evidence of the right of the allottee to the tract therein described, and the United States Indian agent, under the direction of the Secretary of the Interior, was to put him in possession of his allotment and remove others therefrom. Section 21. There were twenty-three distinct reservations of lands. These were not to be allotted. Some of these were for town sites, others for cemeteries, others for school houses and churches, and still others were railroad lands. Section 24. Provision was made for the enrollment of citizens
in order to determine the membership of the tribe. The
40 determinative day was to be September 1, 1902. All citizens
living on that date were to be enrolled. Section 25. No child born thereafter was to be enrolled or be entitled to participate in the tribal property. Section 26. If any person so enrolled died prior to September 1, 1902 his right was to become extinguished and pass to the tribe in general. Section 31. If any person on the roll should die after the first day of September 1902, the allotment was to be made in his name and descend to his heirs as before stated. Section 20. No person not so enrolled was to participate in the distribution of the common property, and those who were enrolled were to participate "in the manner set forth in this act." Section 31. The school fund was to be used under the direction of the Secretary of the Interior, and the moneys therefor were to be appropriated by the Cherokee National Council. Sections 32 and 34. Lands taken for highways, except those laid along section lines were to be paid for by the Cherokee Nation. Section 37. There was a provision for paying occupants of improved lands that should be taken for town sites out of the funds of the tribe,—out of the funds arising from the town sites. Section 39. Persons in possession of town lots were to
have the right to purchase on certain terms. Sections 41-43.
41 Other lots in town sites were to be sold under the direction of
the Secretary of the Interior. Section 44-45. There were provisions for the payment of the committees of appraisement. Section 46. There were provisions for the location of cemeteries and the purchase thereof at the appraised value "for the benefit of the tribe." Section 49. Provision was made for the purchase of various other lots to be paid for by the purchasers into the same fund. The Secretary

of the Interior was to furnish the principal chief with blank patents for all conveyances and when any citizen should receive his allotment the chief should execute and deliver to him "a patent conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificates." Section 58. All conveyances were to be approved by the Secretary of the Interior, and such approval was to "serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent." Section 59. Any allottee accepting such patent was to be "deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in this Act, and to relinquish all his right, title and interest, to the same, except in the proceeds of lands reserved from allotment." Section 60. The patents were to be filed in the
42 office of the Commission and there recorded. Section 62.

It was provided that the tribal government should not continue longer than March 4, 1906. Section 63. The collection of all revenues of the tribe was to be made by an officer under the direction of the Secretary of the Interior. Section 64. All things necessary to carry into effect the provisions of the Act, not otherwise specially provided for, were to be done under the direction of the Secretary of the Interior. Section 65. All funds of the tribe, including all moneys accruing under the provisions of the Act were to be paid out under the direction of said Secretary. Section 66. Said Secretary was to cause to be paid all just indebtedness of the tribe and all warrants drawn by authority of law, such payment to be made from any funds in the United States Treasury belonging to the tribe, and to be made in full before any disposition of any funds belonging to the tribe. Section 67.

As to certain lands in the vicinity of certain public institutions, provision was made for the appraisement of the improvements thereon and for the payment of the appraised value thereof into the Treasury of the United States, "to the credit of the Cherokee Nation." Section 71. The citizens receiving allotments were given certain restricted rights to lease their lands, and it was provided that when cattle were grazed on lands not selected as allotments by
43 citizens, the Secretary of the Interior shall collect from the owners of the cattle a grazing tax "for the benefit of the tribe." Section 72. Any Act of Congress or treaty provision inconsistent with the Act, with one exception which does not concern us now, was declared to be of no further force. Section 73. The Act was not to take effect until ratified at an election by the Cherokee Nation as before stated. Section 74. Finally, provision was made for the election and for proclaiming the result thereof and for certifying the result to the President of the United States.

From this résumé it will appear that the Act contemplated an allotment of all the lands of the nation outside of the reservations, each citizen to receive the equivalent of one hundred and ten acres of the average allottable lands. But inasmuch as the roll had not been made up at the time of the passage of the Act, it was impossible to know exactly the number of the citizens. The allotment of one

hundred and ten acres must have been made in the belief that it would leave a safe margin so that each citizen might receive his allotment. No provision was made however for any further allotment of any lands that might remain after the allotment
44 provided for by the Act. Some thirty-eight thousand Cherokees were enrolled under this Act, and it turned out that there were several thousand acres of land outside the reservations that were not allotted and were not required for allotment in order to give each enrolled Cherokee his one hundred and ten acres, or the equivalent thereof. It is as to these surplus acres that the question arises so far as the question relates to lands. Where was the title to these surplus acres after the allotment was completed? Did it rest in the individuals whose names were on the roll as tenants in common, or did it rest in the Cherokee Nation for the benefit of all its citizens, who were, of course, as the law then stood, under the Act of 1902, the persons whose names were upon the roll? As to the funds, both those already in existence and those to be realized under the provision of the Act, the question also arises whether they belonged to the individuals whose names were upon the roll or to the nation for the benefit of all its citizens. It will be noticed that the act refers to these funds as belonging to "the tribe." That appears in several sections of the Act. The only expression that might refer to the surplus acres is the phrase "other tribal property" in section 20, which provides for the descent to the heirs of an enrolled Cherokee of his "allotment . . . with his proportionate share of other tribal property" in case of his death sub-
45 sequent to the first day of September,—unless possibly we should treat the expression in section 31 as including the surplus acres. That section is the one which provides that no person whose name does not appear upon the roll shall be entitled to participate "in the distribution of the common property of the Cherokee tribe." And that those whose names do appear thereon "shall participate in the manner set forth in this Act." But "the manner set forth in this Act" does not include any provision for dividing up the surplus acres. If Congress intended that the surplus funds should be tribal property it is highly probable that it intended that the surplus acres should also be tribal property. To leave the ownership of several thousand acres in 38,000 individual owners, requiring the joinder of all in any conveyance thereof and entitling each to a partition in a court of equity, is a thing which it is not likely that Congress intended to do. Other legislation with respect to these lands must have been contemplated. Moreover, the Act contemplates the continuance of the tribal government until March 4, 1906, when it might reasonably be expected that the property affairs of the tribe would be wound up, and by subsequent acts, Congress made clear its intention to keep the tribal government alive until the property affairs were disposed of; for by joint
46 resolution of March 2, 1906, 34 Stat. at L. 822, it was declared that the tribal government should be "continued in full force and effect for all purposes under existing laws until all property of such tribe or the proceeds thereof, shall be distributed

among the individual members." And by act of April 26, 1906, 34 Stat. at L., 148 Sec. 26, the tribal government was continued until "otherwise provided by law." No question arises in this case touching the right of the enrolled citizens to their several allotments of lands under the provisions of the act of 1902. For the purposes of this case their right in and to those allotments may well be taken as vested, and not to be affected by any subsequent legislation. The question here relates solely to the title to the surplus acres, as to which there is no provision for allotment under the Act of 1902, and to the funds that should remain after due administration thereof by the Secretary of the Interior. There is no express provision that the enrolled citizens shall be tenants in common, so to speak, of the surplus funds, but it was evidently contemplated by the Act that they would be entitled to a pro rata division of these by virtue of their citizenship. Section 31. Of course they would be so entitled if they remained the only citizens upon the roll. But as to all this property, both the surplus acres and the surplus funds, it is quite plain
47 that the right of the enrolled citizens was by virtue of their citizenship. The title still rested in the Cherokee Nation whose existence was carefully and purposely continued until such time as an actual division should be made.

But if it were not perfectly plain that Congress intended to retain its power of dealing with the tribe as such, and of disposing of its property as it believed the welfare of the tribe required, we should not be justified in adopting the opposite view. The court should indulge a strong presumption in favor of such a retention of power, for we are not lightly to conclude that Congress intended to abandon it. Plenary power over the tribes and their property has been exercised by Congress from the beginning, restrained only by its sense of moral obligation; and we should not be justified in holding that the power had been parted with, unless the Act made it perfectly plain that such was the intention of Congress. Wheeling and Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287; U. S. v. Herron, 20 Wall., 261; U. S. v. Rickert, 188 U. S. 432.

We come now to the Acts of 1906 under which the defendants are proceeding. Several years having elapsed and the allotments having been made under the Act of 1902 and there remaining surplus
48 lands and undistributed funds to a large amount, and there having been born into the tribe more than five thousand children, it was considered by Congress that these children ought in justice to be enrolled and to receive allotments of land or funds in lieu of land, to equalize their condition with that of the members who had been enrolled as of the first day of September 1902. The case is now being disposed of upon demurrer to the bill and consequently we do not consider the claim of the defendants that the Acts of 1906 were passed at the request of the Cherokee National Council. In the view we are taking of the law, that fact would be immaterial, but in any event, it cannot be considered in determining the sufficiency of the bill, for it is not alleged in the bill. By the Act of April 26, 1906, 34 Stat. at L., chapter 1876, section 2, it was provided that for ninety days after the approval of

the Act applications should be received for enrollment of children who were minors living March 4, 1906, whose parents had been enrolled as members of the Cherokee tribe, or had application for enrollment pending at the approval of the Act, and that allotments should be made to children so enrolled. It further provided that if any citizen of the Cherokee tribe should fail to receive the full quantity of land to which he would be entitled under the allotment, he should be paid out of any funds of the tribe a sum equal to twice the appraised value of the land thus deficient. The
49 contention of the plaintiffs is that these provisions are unconstitutional and void, as depriving them of vested property rights under the act of 1902. The provision amounts to an enlargement of the definition of citizenship. The plaintiffs and the other citizens enrolled as of September 1, 1902, were declared by the Act of 1902 to be the citizens and all the citizens of the Cherokee Nation. Congress had undoubted power to make this declaration, to define who should be citizens, and to determine who were citizens in fact. It was a legislative power inherent in Congress by virtue of its supreme authority over the tribe and its property. The fact that certain property rights were attached to citizenship did not impair its power. Wallace v. Adams, 204 U. S. 415; Stephens v. Cherokee Nation, 174 U. S. 445.

This legislative power was not exhausted by the exercise of it in 1902. Congress still had authority to modify its definition of citizenship, or to change its method of determining who were citizens in fact. It was still dealing with the tribe, and until individual property rights had become vested, it had the power which all legislatures have to alter and amend the law. We have already pointed out the reasons which require us to hold that the enrolled citizens
50 were not vested as individuals with property rights in the surplus acres and funds. If we are right in so holding, the only ground of complaint which the plaintiffs can have is that Congress has enlarged the roll of citizens and has thereby diminished their proportionate shares of tribal property. But their right to tribal property by virtue of citizenship is not a vested property right which they can enforce individually. Such a right is derivative, and depends upon the right of the tribe. It cannot be greater than the right of the tribe itself, and that right is subject to the paramount authority of Congress. Hayes v. Barringer, 168 Fed. 221; Conley v. Ballinger, 216 U. S. 84, Fleming v. McCurtain, 215 U. S. 56.

By Act of March 1, 1907, 34 Stat. at L. 1015, 1028, Congress attempted to authorize William Brown and Levi B. Gritts on their own behalf and on behalf of all other Cherokee citizens having like interests, to institute suits in the Court of Claims to determine the validity of the acts here in question. Such suits were brought and the question was determined by the Court of Claims in favor of the validity of the acts. On appeal to the Supreme Court of the United States, it was held that the Act thus attempting to confer jurisdiction on the Court of Claims was ineffective as providing only for the decision of an abstract, moot, question; wherefore the opinion of the Court

of Claims cannot be considered as a judicial decision. Never-
51 theless, having examined the question independently, it is gratifying and reassuring to know that other minds impartially and thoroughly examining the same question, have arrived at the same conclusion. 44 Ct. of Claims, 137.

If we had been disposed to hold otherwise upon the principal question it would have been necessary to have considered other objections to the bill, but as to these we express no opinion.

The result is that the demurrer must be sustained and the bill adjudged insufficient. The rule to show cause why a temporary injunction should not issue must be discharged and the restraining order heretofore issued must be dissolved.

By the Court:

WENDELL P. STAFFORD,
Justice.

52 Filed May 13, 1911.

In the Supreme Court of the District of Columbia.

No. 29926. Equity.

LEVI B. GRITTS et al., Plaintiffs,
vs.
RICHARD A. BALLINGER, Secretary of the Interior et al., Defendants.

Decree.

This cause came on to be heard on the original bill of complaint and the demurrers of the defendants, and the complainants having asked leave to amend their bill, which was granted in open court, and having filed their amendments to said bill, and the cause thereupon coming on to be heard upon the bill as amended, and the demurrers filed to the original bill, which were presented also to the bill as amended and considered in connection therewith, and the same having been argued and fully considered by the court, it is, on this the 13th day of May, 1911, adjudged, ordered and decreed that the demurrers be, and they are hereby, sustained, and the bill dismissed; from which judgment and decree the complainants pray an appeal to the Court of Appeals of the District of Columbia, which is here and now allowed, upon the complainants entering into a bond for costs in the sum of one hundred dollars.

And upon application of complainants to continue in effect the injunction heretofore granted, pending said appeal, it is further adjudged, ordered and decreed that the said in-
53 junction be modified so that the defendant, the Secretary of the Interior, be, and he is hereby enjoined and restrained for a period of 30 days from the issuance of any deed, grant, patent or certificate, conveying or attempting to convey, any of the lands remaining unallotted under the act of July 1, 1902, being the lands described in the bill, or distributing any of the funds now in or

hereafter to come into the possession of the Treasury of the United States to any born after September 1, 1902. It is further adjudged, ordered and decreed, that the said injunction heretofore granted be, and the same is hereby, in all other respects and for all other purposes dissolved.

WENDELL P. STAFFORD,
Associate Justice.

Memorandum.

May 27, 1911.—Bond on appeal approved and filed.

54 *Directions to Clerk for Preparation of Transcript of Record.*

Filed May 27, 1911.

In the Supreme Court of the District of Columbia.

No. Equity 29926.

LEVI B. GRITTS et al.
vs.
WALTER L. FISHER, Secretary, et al.

The Clerk will please include in the record on appeal in this case, the following:

1. Amended bill of complaint and Exhibits thereto, filed May 17, 1911 as of May 13, 1911.
2. Demurrer of defendant Franklin MacVeagh, Secretary of the Treasury.
3. Demurrer of the defendant Richard A. Ballinger, Secretary of the Interior.
4. Order substituting Walter L. Fisher, Secretary of the Interior, as defendant in place of Richard A. Ballinger, Secretary of the Interior.
5. Decree of the Court sustaining defendants' demurrers to plaintiffs' amended bill and dismissing said bill.
6. Written opinion of the Court.
7. This designation of record.
8. Memo. Appeal bond filed.

JOHN J. HEMPHILL,
WM. H. ROBESON,
D. B. HENDERSON,
C. C. CALHOUN,
Attorneys for Plaintiffs.

55 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to —, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 29926 In Equity, wherein Levi B. Gritts, et als. are Plaintiffs and Walter L. Fisher, Secretary of the Interior, et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 1st day of June, 1911.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2311. Levi B. Gritts et al. appellants, vs. Walter L. Fisher, &c., et al. Court of Appeals, District of Columbia. Filed Jun- 1, 1911. Henry W. Hodges, clerk.

No. 2311.

LEVI B. GRITTS et al., Appellants,
vs.
WALTER L. FISHER, Secretary of the Interior, et al., Appellees.

THURSDAY, *June 1st, A. D.* 1911.

Upon application of the appellants, it is this 1st day of June, 1911, ordered that a temporary injunction issue in this case enjoining and restraining the appellee Walter L. Fisher, Secretary of the Interior, from issuing any certificate of allotment, deed, grant or patent conveying or attempting to convey any of the lands remaining unallotted, under the Act of July 1st, 1902, being the lands described in the Bill of Complaint herein, and from distributing any of the funds now in, or hereafter to be received, into the possession of the Treasury of the United States as Cherokee Funds, to any person or persons born since September 1st, 1902. That said temporary injunction enjoining and restraining the said Secretary of the Interior shall be and continue in force until the first Monday of October, 1911, at which time, or as soon thereafter as counsel can be heard, the question whether said injunction shall be continued in force pending the final disposition of the case, shall be considered and determined by the Court. Copy of this order, together with the writ of injunction shall be forthwith served on the appellee, the said Walter L. Fisher, Secretary of the Interior.

PER CURIAM.
June 1, 1911.

No. 2311.

LEVI B. GRITTS, RICHARD M. WOLFE, and FRANK J. BOUDINOT, for Themselves and for and on Behalf of All Cherokees Enrolled for Allotment as of September 1, 1902, under Act of Congress Approved July 1, 1902, Appellants,
vs.
WALTER L. FISHER, Secretary of the Interior, and FRANKLIN MACVEAGH, Secretary of the Treasury.

MONDAY, *October 2nd, A. D.* 1911.

The motion to continue the injunction in the above entitled cause until further order, was submitted to the consideration of the Court by Mr. J. J. Hemphill of counsel for the appellants in support of motion and by Mr. F. W. Clements in opposition thereto. On consideration whereof It is by the Court this day ordered that said motion be and the same is hereby granted.

No. 2311.

LEVI B. GRITTS, RICHARD M. WOLFE, and FRANK J. BOUDINOT, for Themselves and for and on Behalf of All Cherokees Enrolled for Allotment as of September 1, 1902, under Act of Congress Approved July 1, 1902, Appellants,

vs.

WALTER L. FISHER, Secretary of the Interior, and FRANKLIN MACVEAGH, Secretary of the Treasury.

MONDAY, *October 9th, A. D.* 1911.

On motion, each side is allowed two hours in the argument of this cause.

The argument in the above entitled cause was commenced by Mr. J. J. Hemphill, attorney for the appellants, and was continued by Mr. R. S. Huidekoper, attorney for the appellees, and by Mr. D. B. Henderson, attorney for the appellants, and by Messrs. F. W. Clements and W. W. Hastings, attorneys for the appellees, and was concluded by Mr. W. H. Robeson, attorney for the appellants.

On motion the appellants are allowed five days to file a supplemental brief herein if so advised.

No. 2311.

LEVI B. GRITTS, RICHARD M. WOLFE, and FRANK J. BOUDINOT, for Themselves and for and on Behalf of All Cherokees Enrolled for Allotment as of September 1, 1902, under Act of Congress Approved July 1, 1902, Appellants,

vs.

WALTER L. FISHER, Secretary of the Interior, and FRANKLIN MACVEAGH, Secretary of the Treasury.

Opinion.

Mr. Justice BARNARD, of the Supreme Court of the District of Columbia, who sat with the Court in the hearing of this case in the place of Mr. Justice Van Orsdel, delivered the opinion of the Court:

This is an appeal from a decree of the Supreme Court of the District of Columbia, sustaining demurrers and dismissing the bill, in Equity Cause No. 29,926.

The bill was filed by Levi B. Gritts, Richard M. Wolfe, and Frank J. Boudinot, for themselves, and for and on behalf of all Cherokees enrolled for allotment as of September 1, 1902, under the act of Congress approved July 1, 1902 (32 Stat., 716).

The complainants are residents of Oklahoma, Cherokees by blood, and were enrolled for allotment as of September 1, 1902, under the said act.

The complainants aver that the said act was accepted and agreed to by the Cherokees by popular vote on August 7, 1902, and duly proclaimed on August 12, 1902; that the members of the Cherokee tribe living on September 1, 1902, became thereby, on that date, the equal owners, as individuals, of all the property real and personal, which had theretofore been owned by them as a community; that all the tribe living on said date, numbering about 36,000, were duly enrolled; and that thereupon, each became entitled to an equal distributive share of all said property, to the exclusion of all other persons whatsoever.

They further aver that it was provided by said agreement that there should be given an allotment of land equal in value to 110 acres of average allottable lands, to each of said persons so enrolled as of September 1, 1902, to be selected by him, or his legal representative; and provided that, if any individual so enrolled should die, after September 1, 1902, before receiving his allotment, his said allotment, together with his proportionate part of all the other property of said tribe should descend to his heirs.

They further aver that after the said allotment is made to the 36,000 persons enrolled, and entitled thereto, there will be about 440,000 acres of such average lands left as surplus, and about $2,500,000 in money in the Treasury, belonging to the said allottees.

The complainants aver that by section 16 of the act of April 26, 1906 (34 Stat., 137), it was provided that after allotments had been made, in accordance with the said act of July 1, 1902, the residue of lands remaining unallotted should be sold by the Secretary of the Interior, and the proceeds added to the fund in the Treasury of the United States; and after paying all just charges, the remainder of such fund should be distributed per capita by the Secretary of the Interior to the members then living, and to the heirs of deceased members whose names appear upon the finally approved rolls.

They claim that by the said acts of July 1, 1902, and April 26, 1906, the persons enrolled as of September 1, 1902, became the exclusive and absolute owners of all the lands and all the funds formerly belonging to the Cherokee tribe; and that it was the duty of the defendant, the Secretary of the Interior, after making allotments, as provided by said act of July 1, 1902, to convert the remainder of the lands unallotted into money, and add the same to the said Cherokee fund, and to distribute it per capita to the complainants and those on whose behalf this suit is brought, and their heirs, to the exclusion of all other persons.

Notwithstanding this, they aver that the said Secretary has allotted and patented part of the said surplus lands to one or more persons born since September 1, 1902, and that he is about to allot and patent all the remaining surplus lands owned by the complainants and those they represent, to children born since September 1, 1902; and that he has decided to distribute a large part of the funds owned by the complainants, and held in the Treasury, to said minor children born since September 1, 1902, all without the con-

sent of the complainants, and in violation of their indefeasible property rights in the premises.

That he will, unless enjoined and restrained, order and direct the allotment of all the surplus lands owned by the complainants, to 5,610 children born after September 1, 1902, and will order the distribution of a large part of the funds in the Treasury owned by complainants to said minor children, in violation of the rights of the complainants; and that the defendant, the Secretary of the Treasury, will, unless enjoined and restrained, pay out of the said funds in the Treasury a large sum of money to said children.

That the aggregate value of the lands and funds belonging to the complainants, and the other persons enrolled as of September 1, 1902, about to be so allotted and paid out to said children in violation of law, is about $1,000 to each of said children, making in all more than $5,500,000.

They aver that they became, by said act of July 1, 1902, vested with an absolute and indefeasible right and title to all lands and funds of the former Cherokee Nation, with individual estates of inheritance thereunder, and that by the said proposed action of the Secretary of the Interior, and of the Secretary of the Treasury, they will be deprived of such property as remains unallotted and undistributed under the terms of said act and Cherokee agreement of July 1, 1902, without due process of law.

They therefore pray for an injunction against the defendants, to prohibit them from disposing of the said property, against the claims of the complainants, and to require the Secretary of the Interior to cancel the allotments and patents made to any children born since September 1, 1902; and to require him to proceed with the sale of the surplus lands, and the payment of the proceeds into the Treasury for the benefit of the complainants and those they represent; and that the defendants may both be required, after such sale and deposit, to pay out and distribute all such moneys to the complainants, and other Cherokees enrolled under the said act and agreement of July 1, 1902, per capita, in accordance with the provisions thereof.

The defendants filed separate demurrers to the bill, for want of equity, claiming that the complainants have no right or interest which entitles them to the relief sought.

These demurrers were sustained, and the bill was dismissed, and complainants have appealed to this court.

Under the said act of July 1, 1902, the tribal government of the Cherokee Nation was to continue until March 4, 1906. All revenues belonging to the tribe were to be collected by an officer appointed by the Secretary of the Interior, and all moneys belonging to the tribe were to be paid out under the direction of the Secretary of the Interior, and he was to cause to be paid out all just indebtedness of the tribe existing at the date of the ratification of the said act, before any pro rata distribution could be made.

The act does not expressly declare what the Secretary shall do with the remaining land, after making the allotments of 110 acres to each member of the tribe properly enrolled; but we think it may be as-

sumed that so long as the tribal government was to continue, Congress intended that the community property, not allotted, should remain community property, and that the common charges and expenses should be paid therefrom before such surplus would be distributable to the individuals.

The said act of April 26, 1906, however, provides for the partition of the remaining land, by sale, and for the payment of the proceeds into the Treasury. If this had been the only provision of the new legislation, we think the contention of the complainants would be correct, and that they would be entitled to receive all the net proceeds of sales and the balance of funds remaining in the Treasury; but the same act extends the time for completing the rolls, and authorizes the enrollment of additional members of the tribe, to wit, all minor children living on March 4, 1906, whose parents had been enrolled or whose applications for enrollment were pending on April 26, 1906, and directs that allotments shall be made to such children, illegitimate children taking the status of the mother; and it provides for equality, by payments in cash, if the lands are not sufficient for making such allotments.

This act of April 26, 1906, was amended by the act of June 21, 1906 (34 Stat., 325), and in the last named act (34 Stat., 340), some other names were added to the roll of the Cherokees entitled to shares of said tribal property.

This legislation clearly indicates, in our opinion, that Congress intended to retain control of the surplus lands and funds of the Cherokee tribe until such time as the enrollment of members should be complete and until the final dissolution of the tribal government. We think it had the undoubted right to so retain control, not only of the Indians themselves (as is provided by the said acts, which limit their right to dispose of or lease their several parcels of land after allotment to them), but of the tribal government, the roll of members, and of the undivided property of the community or tribe; and that Congress did not by said act of July 1, 1902, intend to constitute the complainants, and those they represent, the exclusive owners, as tenants in common, of the undivided community or tribal property.

Being of that opinion, from a careful consideration of the statutes and authorities, we find that the decree of the learned justice of the Supreme Court of the District of Columbia sustaining the demurrers and dismissing the bill was correct, and the same will therefore be affirmed with costs.

Affirmed.

MONDAY, NOVEMBER 6*th*, *A. D.* 1911.

No. 2311. October Term 1911.

LEVI B. GRITTS, RICHARD M. WOLFE, and FRANK J. BOUDINOT, for Themselves and for and on Behalf of All Cherokees Enrolled for Allotment as of September 1, 1902, under Act of Congress Approved July 1, 1902, Appellants,

vs.

WALTER L. FISHER, Secretary of the Interior, and FRANKLIN MACVEAGH, Secretary of the Treasury.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE BARNARD.

November 6, 1911.

(Mr. Justice Van Orsdel did not sit in this case.)

FRIDAY, NOVEMBER 17*th*, *A. D.* 1911.

No. 2311.

LEVI B. GRITTS, RICHARD M. WOLFE, and FRANK J. BOUDINOT, for Themselves and for and on Behalf of All Cherokees Enrolled for Allotment as of September 1, 1902, under Act of Congress Approved July 1, 1902, Appellants,

vs.

WALTER L. FISHER, Secretary of the Interior, and FRANKLIN MACVEAGH, Secretary of the Treasury.

On motion of Mr. R. S. Huidekoper, of counsel for the appellees in the above entitled cause, It is ordered by the Court that the decree entered in said cause on November 6, 1911, be, and the same is hereby, amended so as to provide that the order of this Court of June 1, 1911, granting a temporary injunction herein, and the order of October 2, 1911, continuing the same, be, and they are hereby, vacated and for nothing held.

No. 2311.

LEVI B. GRITTS, RICHARD M. WOLFE, and FRANK J. BOUDINOT, for Themselves and for and on Behalf of All Cherokees Enrolled for Allotment as of September 1, 1902, under Act of Congress Approved July 1, 1902, Appellants,

vs.

WALTER L. FISHER, Secretary of the Interior, and FRANKLIN MACVEAGH, Secretary of the Treasury.

On motion of Mr. J. J. Hemphill, of counsel for the appellants in the above entitled cause, it is ordered by the Court that said appellants be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars.

In the Court of Appeals of the District of Columbia, October Term, 1911.

No. 2311.

LEVI B. GRITTS et al., Appellants,

vs.

WALTER L. FISHER, Secretary of the Interior, et al., Defendants.

Come now the appellants, by their attorneys, William H. Robeson, John J. Hemphill, D. B. Henderson and C. C. Calhoun, and ask leave to file the following Assignments of Error and that said Assignments be incorporated in the transcript of record on appeal to the Supreme Court of the United States.

WM. H. ROBESON,
JNO. J. HEMPHILL,
D. B. HENDERSON,
C. C. CALHOUN,
Attorneys for Appellants.

Assignments of Error.

1. Because the Court failed to hold that the title to the lands in controversy was vested in the Cherokee people and not in the Tribe or Nation, and that it was a fee simple title, and that the funds involved were held in the same right.

2. Because the Court failed to hold that the Act of Congress of July 1, 1902 (32 Stat., 716), was in effect, an agreement by the Cherokee people for the final partition and division of all their lands and funds, and that the Secretary of the Interior was simply the agent of the owners of said properties to carry out their agreement.

3. Because the Court held that the property in controversy was community property.

4. Because the Court held that the Act of April 26, 1906 (34

Stat., 148), extended the time for the completion of the Cherokee Roll and authorized the enrollment of additional members of the Tribe and failed to hold that the said Act of April 26, 1906, expressly exempts the Cherokee Nation from the enrollment of any other person or persons whatsoever, and that there were and in fact, could be, no additional members of said Tribe to be enrolled under said Act of April 26, 1906, or any other Act of Congress.

5. Because the Court held that the Act of April 26, 1906, provided for the enrollment of all minor children living on March 4, 1906, whose parents had been enrolled as Cherokees, or whose applications for enrollment were pending on April 26, 1906, and because the Court failed to hold that if any Cherokee minors could be enrolled under said Act it could be those only who were living Sept. 1, 1902, as required by the terms of the Act of July 1, 1902, and who in all other respects fulfilled the requirements of said Act and were also living April 26, 1906, as required by the terms of the said Act of that date.

6. Because the Court held that said Act of April 26, 1906, "provides for equality, by payments in cash, if the lands are not sufficient for making such allotments."

7. Because the Court held that by the Act of June 21, 1906 (34 Stat., 325), "some other names were added to the Roll of the Cherokees entitled to shares of said tribal property."

8. Because the Court held that "Congress intended to retain control of the surplus lands and funds" and failed to hold that the surplus lands and funds, after the allotment of 110 acres of land to each allottee, were already vested in the Cherokees enrolled under the Act of July 1, 1902, and that it was not in the power of Congress to control or dispose of the same.

9. Because the Court failed to hold that the Cherokee tribal Government ceased to exist on March 4, 1906.

10. Because the Court failed to hold that if, and in so far as, any Act or Acts of Congress attempt to authorize defendants to dispose of the property in question, and give it to persons other than plaintiffs and those on whose behalf they sue, such Act or Acts are unconstitutional and void, in that they attempt to take plaintiffs' property without due process of law.

11. Because the Court affirmed the decision of the Supreme Court of the District of Columbia in sustaining the demurrers of the defendant and dismissing the bill.

W. H. ROBESON,
JNO. J. HEMPHILL,
D. B. HENDERSON,
C. C. CALHOUN,
Appellants Att'ys.

(Endorsed:) Levi B. Gritts, et al. vs. Walter L. Fisher, Secty. of the Interior, et al. Assignments of Error. Court of Appeals, District of Columbia. Filed Dec. 14, 1911. Henry W. Hodges, Clerk.

(*Bond on Appeal.*)

Know all men by these presents, That we, Levi B. Gritts, Richard M. Wolfe and F. J. Boudinot, as principals, and National Surety Company, a corporation of New York, as surety, are held and firmly bound unto Walter L. Fisher, Secretary of the Interior, and Franklin MacVeagh, Secretary of the Treasury, or either of them, in the full and just sum of Three Hundred ($300.00) dollars, to be paid to the said Walter L. Fisher, Secretary of the Interior, and Franklin MacVeagh, or either of them, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this fourteenth day of December, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Levi B. Gritts, Richard M. Wolfe and F. J. Boudinot, and Walter L. Fisher, Secretary of the Interior, and Franklin MacVeagh, Secretary of the Treasury, a decree was rendered against the said Levi B. Gritts, Richard M. Wolfe and F. J. Boudinot, and the said Levi B. Gritts, Richard M. Wolfe and F. J. Boudinot having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Walter L. Fisher, Secretary of the Interior and Franklin MacVeagh, Secretary of the Treasury, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Levi B. Gritts, Richard M. Wolfe and F. J. Boudinot shall prosecute said appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

LEVI B. GRITTS, [SEAL.]
RICHARD WOLFE, [SEAL.]
FRANK J. BOUDINOT, [SEAL.]
By JNO. J. HEMPHILL, *Attorney.* [SEAL.]
NATIONAL SURETY COMPANY, [SEAL.]
By W. H. RONSAVILLE, *Attorney-in-Fact.*

[Seal of National Surety Company.]

Sealed and delivered in presence of—
PRESTON B. RAY.
ANNIE C. SCHNERMANN.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 2311. Levi B. Gritts, et al., Appellants, vs. Walter L. Fisher, Secretary of the Interior, et al. Bond for Costs on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Dec. 14, 1911. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, ss:

To Walter L. Fisher, Secretary of the Interior, and Franklin MacVeagh, Secretary of the Treasury, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Levi B. Gritts, Richard M. Wolfe, and Frank J. Boudinot, for themselves and for and on behalf of all Cherokees enrolled for allotment as of September 1, 1902, under Act of Congress approved July 1, 1902, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 14th day of December, in the year of our Lord one thousand nine hundred and eleven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged Dec. 14th, 1911.

F. W. CLEMENTS,
Counsel for Appellees.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 14, 1911. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 46 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Levi B. Gritts, Richard M. Wolfe and Frank J. Boudinot, for themselves and for and on behalf of all Cherokees enrolled for allotment as of September 1, 1902, under Act of Congress approved July 1, 1902, Appellants, vs. Walter L. Fisher, Secretary of the Interior, and Franklin MacVeagh, Secretary of the Treasury, No. 2311, October Term, 1911, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 14th day of December, A. D. 1911.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,972. District of Columbia Court of Appeals. Term No. 896. Levi B. Gritts, Richard M. Wolfe and F. J. Boudinot, appellants, vs. Walter L. Fisher, Secretary of the Interior, and Franklin MacVeagh, Secretary of the Treasury. Filed December 18th, 1911. File No. 22,972.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

LEVI B. GRITTS ET AL., APPELLANTS,
v.
WALTER L. FISHER, SECRETARY OF THE INTERIOR, AND FRANKLIN MACVEAGH, SECRETARY OF THE TREASURY. } No. —.

APPEAL FROM THE COURT OF APPEALS, DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

Comes now the Solicitor General and, on behalf of the Secretary of the Interior and the Secretary of the Treasury, moves that this case be advanced to be heard on the same day with the case of *The Cherokee Nation and the United States* v. *Moses Whitmire, etc.*, No. 735 on the docket of the court for the present term, which has been advanced by the court to be heard on January 8.

The present case does not involve the same questions as the *Whitmire* case, but it does affect the same funds and the same lands; and a proper distribution can not be made of those funds and lands until it has been determined who are entitled to

share in the distribution. In the present case the rights of 5,500 Cherokees by the blood are involved, their claims being based upon the act of April 26, 1906, 34 Stat. 137, the constitutionality of which is challenged by the appellants in this proceeding. The Secretary of the Interior and the Secretary of the Treasury are both of opinion that final distribution of the funds and lands of the Cherokees should be made as soon as possible, and that it can not be made until this case, as well as the *Whitmire* case, has been determined; and they have requested the Solicitor General to make this motion.

Appellants concur in the motion.

F. W. LEHMANN,
Solicitor General.

DECEMBER, 1911.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 896.

LEVI B. GRITTS, RICHARD M. WOLFE, and FRANK J. BOUDINOT, for themselves and for and on behalf of all Cherokees enrolled for allotment as of September 1, 1902, under act of Congress approved July 1, 1902, *Appellants*,

vs.

WALTER L. FISHER, Secretary of the Interior, and FRANKLIN MACVEAGH, Secretary of the Treasury, *Appellees*.

BRIEF ON BEHALF OF APPELLANTS.

This cause is pending in this Honorable Court on appeal from the judgment of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District of Columbia, sustaining defendants' demurrers and dismissing the Bill.

STATEMENT.

The suit is one to enjoin the Secretary of the Interior from allotting certain Cherokee lands and the Secretary of the Treasury from paying certain Cherokee funds to other persons than those enrolled for allotment under the Act of July 1, 1902 (32 Stat., 716), known as the Cherokee Agreement.

The case was heard upon demurrers to the bill (Rec., 22), and should have been disposed of without reference to facts brought upon the record from any other source.

Plaintiffs rest their case upon the right of ownership of the property in question by virtue of the Cherokee Treaty of 1828 and subsequent treaties and by virtue of the Act of July 1, 1902, *supra,* known as the Cherokee Agreement or Allotment Act.

This act provides expressly that all the property in question shall be allotted or paid to plaintiffs and those on whose behalf this suit is brought, they being members of the Cherokee Tribe living on September 1, 1902, and enrolled for allotment as of that date; and it declares in positive terms that no part of the said property shall be alloted or distributed to any person born after September 1, 1902.

The Secretary of the Interior, in disregard of the provisions of the said act, was, at the time of filing of the suit, proceeding to dispose of said property to others, to wit, to persons born since September 1, 1902.

Plaintiffs contend that such disposition of the property is unlawful; that there is no act of Congress authorizing either of the defendants to dispose of any of the property in question otherwise than in strict accordance with the said Cherokee Agreement, and that should the terms of any later act be construed as an attempt to authorize a different disposition of the property, the provisions of the

later act in that particular would violate plaintiffs' vested property rights and be unconstitutional and void (Rec., 8).

Defendants admit that plaintiffs are vested with absolute title to the lands allotted under the said act of July 1, 1902, but deny that they own the unallotted lands and the Cherokee vested funds in the Treasury of the United States, and contend that the Secretary of the Interior is authorized to allot the surplus lands, and to distribute the vested funds to other persons than those enrolled under the said act of July 1, 1902.

The trial court in its opinion (Rec., 27) holds that defendants are proceeding lawfully under "the acts of 1906," and sustains the demurrers.

THE BILL.

Plaintiffs' bill alleges that the suit is brought on behalf of themselves and of all other persons enrolled for allotment as of September 1, 1902, under the Cherokee Agreement, that they are citizens of the United States, Cherokees by blood and members of the Keetoowah Society; that the defendants are sued as Secretary of the Interior and Secretary of the Treasury respectively; that under and by virtue of the said Cherokee Agreement duly ratified and proclaimed by the authorities of the Cherokee Nation and of the United States the members of the Cherokee Tribe living on September 1, 1902, numbering more than 36,000 duly enrolled persons, became on that date the sole owners of all Cherokee property, both lands and funds, with individual estates of inheritance therein, which property they had formerly owned as a community; that each person so enrolled was to receive an allotment of land equal in value to 110 acres of average allotable lands of the Cherokee Na-

tion, and that after providing such allotments there remained a surplus of about 4,000 average allotments of land, amounting to about 440,000 acres of land and about $2,000,000 of Cherokee funds deposited in the Treasury of the United States; that the plaintiffs, under the terms of the said act, became and were entitled to equal distributive shares of all said lands and funds to the exclusion of all other persons whomsoever, and especially of any child born after September 1, 1902. The bill also sets forth the pertinent paragraphs of the said act that contain the provisions relating to said allegations.

The bill then alleges that by the terms of the said agreement it is provided that the Secretary of the Interior should supervise and direct the appraisement and allotment of said lands and the distribution of said funds to the persons above described, and that each should receive an allotment of land of specified value, together with his proportionate share of all other tribal property, but the allotment or distribution of any of said lands or funds to any other person is expressly prohibited; that if any person entitled to an allotment die after September 1, 1902, the allotment, together with decedent's share of other tribal property, should descend to his heirs.

After which, fourteen additional sections of the said agreement are set forth in detail, containing the pertinent provisions relating to said allegations.

The bill then shows that by Sections 16 and 17 of the Act of April 26, 1906 (34 Stat., 137), the defendant, the Secretary of the Interior, was specifically charged with the duty of selling the lands not needed for allotment and distributing the proceeds along with other tribal funds per capita among the plaintiffs, and alleges that plaintiffs and those on whose behalf this suit is brought became and were the absolute owners of all the lands and all the funds of the Cherokee Tribe.

It is then alleged in the bill that the defendant, the Secretary of the Interior, is allotting, or is about to allot, and the Secretary of the Treasury is distributing, or is about to distribute, some of the said property to persons other than the plaintiffs, to wit, persons born since September 1, 1902, all in violation of law, and plaintiffs say that the defendants thereby are about to divest them of their indefeasible right, title and interest in and to the said lands and funds, without due process of law, and that, unless enjoined and restrained, the legal title to the property in question will become vested in other persons who are not entitled thereto.

Accordingly the prayer for relief by injunction is set forth, to restrain the allotment of lands and the distribution of said funds to other persons than the plaintiffs.

DEMURRERS.

Demurrers were filed by defendants, in which, besides the general grounds, two special grounds were set forth and considered by the Court, viz: (R., 19, 20, 21.)

(a) That the plaintiffs have no such right, title, or interest in the unallotted lands of the Cherokee Nation or the funds in the Treasury of the United States, of which the United States is a trustee for and on behalf of the Cherokee Nation, as would entitle plaintiffs to maintain this suit.

(b) That an injunction is sought against defendants to restrain them from carrying out the terms and provisions of an act of Congress relating to a subject matter of which Congress has plenary jurisdiction and power, and concerning which the Courts have no jurisdiction to interfere, to wit, the control and disposition of the property of the Cherokee tribe or nation of Indians.

OPINION.

The opinion of the trial court, rendered May 10, 1911 (Rec., 22-29), holds that the demurrers should be sustained, the injunction dissolved and the bill dismissed, and that defendants were proceeding legally under "the Acts of 1906" to allot surplus lands of the Cherokees and distribute their vested funds to other persons than plaintiffs, for the reason that said lands and funds belong to the Cherokee Tribe or Nation and were therefore subject to such disposition as Congress might see fit to make thereof.

The opinion declares that before the passage of the Act of 1902 the title to the property in question was vested in the Cherokee Nation for the common use and benefit of all its members, subject to the paramount authority of Congress; that the power of Congress in dealing with the tribe or nation in respect to its property is supreme, and unlimited except by its own sense of justice and duty towards them; that Congress is not even bound to respect its own treaty stipulations with an Indian Tribe, and if it disregards or breaks such stipulations the constitutionality of its act cannot even be tested in the courts; that no matter what title the United States had bestowed upon the Cherokee Nation in its political capacity that title was not one that affords any standing ground upon which to test the validity of an Act of Congress in dealing with the same; that the Act of July 1, 1902, contemplated an allotment of all the Cherokee lands outside of the reservations, and that a surplus having been found to exist, after providing an allotment of 110 acres to each enrolled Cherokee, such surplus remained tribal property; that for the purpose of this case the right of all Cherokees enrolled under the Act of July 1, 1902, to their allotments may be taken as vested and not affected by any subsequent legislation, but that the right of the Cherokees in and to the surplus

lands and the invested funds was a derivative right, based wholly upon citizenship in the Cherokee Nation, and that Congress had plenary power to modify its definition of citizenship, or to change its method of determining who were citizens in fact, and that if in so doing the rights of the individual members of the tribe in tribal property were diminished, no such member could complain. In other words, that the members of the tribe had no vested property rights in the unallotted and undistributed property which they could enforce or protect.

It would appear that the decision of the trial court in sustaining the demurrers is based to a large extent upon the following findings of fact, which are to be found in the opinion of the Court, *but nowhere else in the record,* to wit, that within several years after allotments had been made under the Act of 1902 more than 5,000 children were born *into the tribe,* and that it was considered by Congress that these children ought, in justice, to be enrolled and to receive allotments of land or funds in lieu of land of twice the value thereof, to equalize their condition with that of the members who had been enrolled as of the first day of September, 1902.

DECREES.

The decree in the trial court, filed on May 13, 1911, sustained the demurrers and dismissed the bill, but granted an appeal, and continued in effect the injunction previously granted for a period of thirty days, which injunction was later extended by the Court of Appeals till the first Monday of October, 1911. (Rec., 29, 30.)

On the 6th day of November, 1911, the decree of the trial court was affirmed by the Court of Appeals of the District of Columbia, the injunction dissolved and thereafter an appeal to this court was granted (Rec., 37-8).

ASSIGNMENT OF ERRORS.

The Court of Appeals erred:

1. In not holding that the title to the lands in controversy was vested in the Cherokee people and not in the Tribe or Nation, and that it was a fee simple title, and that the funds involved were held in the same right.

2. In holding that the property in controversy was community property.

3. In holding that "Congress intended to retain control of the surplus lands and funds" and in failing to hold that the surplus lands and funds, after the allotment of 110 acres of land to each allottee, were already vested in the Cherokees enrolled under the Act of July 1, 1902, and that it was not in the power of Congress to control or dispose of the same.

4. In failing to hold that the Cherokee tribal government ceased to exist on March 4, 1906.

5. In failing to hold that if, and in so far as, any Act or Acts of Congress attempt to authorize defendants to dispose of the property in question, and give it to persons other than plaintiffs and those on whose behalf they sue, such Act or Acts are unconstitutional and void, in that they attempt to take plaintiffs' property without due process of law.

6. In affirming the decision of the Supreme Court of the District of Columbia in sustaining the demurrers of the defendant and dismissing the bill.

THE ISSUES.

The issues in the case, briefly stated, are:

1. Did plaintiffs under the Act of July 1, 1902, standing alone, or as amended by Sections 16 and 17 of the Act of April 26, 1906, become the absolute owners as individuals of all the common property, lands and funds, of the Cherokees, with estates of inheritance therein?

2. If so, did Congress, by the Act of April 26, 1906, as amended by the Act of June 21, 1906, intend to deprive plaintiffs of a portion of said property and give it to five thousand or more other persons born after September 1, 1902?

3. If so, is such later legislation constitutional?

THE SUBJECT MATTER.

The subject matter of this suit, as is alleged in Section 3 of the bill (Rec., p. 2), involves the *ownership* by the Cherokees living September 1, 1902, or their heirs, as individuals, of all property of the Cherokees, both lands and funds, theretofore owned by them as a community.

The Supreme Court of the United States, referring to the same lands, in the Intermarriage Cases (203 U. S. 76), said:

> "The subject matter of this suit consists of 4,420,460 acres of land in the Cherokee country about to be allotted among the Cherokee people entitled to participate in the distribution of the common property of the Cherokee Nation."

The plaintiffs here, as in the Intermarriage Cases, are individual Cherokees enrolled for allotment under the Act of July 1, 1902, and are suing, as they were in that case, to prevent persons from participating in the allotment of these

Cherokee lands and the distribution of the other Cherokee property who are not entitled thereto.

The fact that the Cherokees, as a community, owned all the property in question on July 1, 1902, is conceded. The lands were acquired by unconditional grant from the United States under the treaty of May 6, 1828 (7 Stat., 311), and after that date the Cherokees parted with no interest therein up to September 1, 1902, except that in 1839 they dedicated to the Cherokee National Government the right to manage and control the use of the lands until allotment should occur.

THE CASE WAS HEARD ON DEMURRER, AND MUST BE DECIDED SOLELY UPON ALLEGATIONS OF FACT CONTAINED IN THE BILL.

The opinion of the trial court states that the case has been heard solely upon demurrer. Therefore no facts, save such as are alleged in the bill, can be considered. The case must be decided solely upon the allegations therein contained, and those allegations cannot be added to by assertions of counsel on either side, by statements in briefs or by findings of the Court.

On page 27 of the record the Court declares that defendants are proceeding under "the acts of 1906," and states:

That "several years having elapsed and the allotments having been made under the act of 1902, and there remaining surplus lands and undistributed funds to a large amount, and there having been born into the tribe more than 5,000 children, it was considered by Congress that these children ought in justice to be enrolled, and to receive allotments of land, or funds in lieu of land, to equalize their condition with that of the members who had been enrolled as of the first day of September, 1902."

Only one of the facts above stated, or implied in the

statement, can be found in the bill, namely, that after allotment there remained surplus lands and undistributed funds to a large amount.

That (all) the allotments under the Act of 1902 had been made is not alleged in the bill, and it was not a fact; that there had been born into the tribe more than 5,000 children is not alleged, and, according to plaintiff's contention, it was not a fact; that it was considered by Congress that these children ought in justice to be enrolled is not alleged, and there is no evidence that Congress did so consider; that Congress intended to equalize the condition of such children with that of members of the tribe enrolled under the act of 1902 is not alleged, and plaintiffs submit that Congress itself does not so declare, and the act shows the contrary.

The opinion (on pp. 27 and 28) sets out that portion of Section 2 of the Act of April 26, 1906, which provides that for ninety days after the approval of the act applications for enrollment of minor children of members of the several tribes should be received, provided the children were living March 4, 1906, and their parents had been enrolled as members of the Tribe, or had applications for enrollment pending at the approval of the act; and the further provisions that if any citizen of the Cherokee Tribe should fail to receive the full quantity of land to which he would be entitled under the allotment, he should be paid out of any funds of the tribe a sum equal to twice the appraised value of the land thus deficient.

But the court fails to refer to that provision of Section 2 of the act which declares:

> "That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States."

which entirely prevents conflict between the section and the Act of July 1, 1902, for the Cherokees had such an agreement, and it is the very agreement pleaded by plaintiffs in their bill, *i. e.*, the Act of July 1, 1902.

So far as the Cherokees are concerned the Act of April 26, 1906, is not in conflict with the Act of July 1, 1902, but was intended to supplement it, and it does so supplement it, and directs the defendants specifically how they shall carry out the terms of the Act of 1902 in all respects in which the latter Act lacks specific directions to the Secretary of the Interior.

Particularly is this true with reference to the sale of the surplus lands, which the Secretary of the Interior is by the Act of 1906 directed to reduce to cash, and the proceeds from which he is to deposit in the Treasury of the United States to the credit of the Tribe.

Then follows the provision that after paying all just debts against the fund he shall distribute the remainder to the members of the tribe *per capita*.

It is instructive to note the language of Section 17 of the Act of April 26, 1906, directing that such funds:

> "Shall be distributed *per capita* to the members then living and the heirs of deceased members whose names appear upon the final approved rolls of the respective tribes."

At the time this act was passed, the Act of July 1, 1902, was in full force and effect. "The members then living whose names appeared upon the finally approved roll of the Cherokee Tribe and their heirs," could have referred to no persons save those enrolled under the Act of July 1, 1902, as of September 1, 1902, because there were no other Cherokees entitled to enrollment for allotment, as the lower court in its opinion declares.

It is true that there was contained in the Indian Appro-

priation Act for the year 1906, approved June 21, 1906 (34 Stat., 321), the following provision:

> "That section two of the act entitled 'An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes, approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby, amended by striking out thereof the words '*Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided further*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation whose cases are now pending in the Supreme Court of the United States.' And insert in said act in lieu of the matter repealed, the following: *Provided further*, That nothing herein shall be construed so as hereafter to permit any person to file an application for enrollment or to be entitled to enrollment in any of said tribes, except for minors the children of Indians by blood, or of freedmen members of said tribes, or of Mississippi Choctaws identified under the fourteenth article of the treaty of eighteen hundred and thirty, as herein otherwise provided, and the fact that the name of a person appears on the tribal roll of any of said tribes shall not be construed to be an application for enrollment."

Evidently the court was not justified in supplying facts from this source, for there is nothing in the record to show that the persons as to whom plaintiffs ask that defendants be enjoined are the persons provided for in the foregoing section.

And since they do not appear from the bill, they cannot be supplied by a finding of the Court, in order to bring the case at bar within the purview of the statute, assuming even that the statute is to be construed as the Court below has done. Such facts to avail the defendants must be pleaded.

THE ACT OF JULY 1, 1902.

By the Act of July 1, 1902, provision was made for partitioning the lands by allotment among the members of the tribe, and for distributing to them the other tribal property.

September 1, 1902, was fixed by the Act as the day as of which this allotment should take place (Sec. 25), and the Act provided that no child born thereafter to a citizen should be entitled to participate in the distribution of the tribal property (Sec. 26).

The Act was submitted to the Cherokees for approval, was ratified by them on August 7, 1902, and became a partition agreement among all the members of the tribe living on September 1, 1902, their property law, as well as an agreement by the Cherokee people and Cherokee National Government with the United States.

The court holds that the Act of 1902 vests in Cherokees enrolled under said Act, in individual right, the lands allotted them, and we insist that these enrolled Cherokees were likewise vested in the same manner with their proportionate shares of the undistributed property.

By Act of March 3, 1893 (27 Stat., 645, Sec. 16), the Dawes Commission was created to negotiate with the Cherokee and other tribes in Indian Territory, "for the purpose of the extinguishment of the national or tribal title to any lands within that territory" held by Indians.

The Act of 1902 covers all the property of the Cherokee Tribe and not simply those parts which have been allotted.

The title of the Act of 1902 is "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes."

This makes no reference to a *part* of the land, and no words of the Act restrict the language to any particular portion of the property.

Section 5 of the Act of 1902 declares that:

> "The terms 'allotable lands' or 'lands allotable' shall be held to mean all the lands of the Cherokee Tribe not herein reserved from allotment."

The lands reserved from allotment are set forth in Section 24 and cover the property set apart for churches, seminaries, cemeteries, etc.

Section 9 provides that:

> "The lands belonging to the Cherokee Tribe of Indians in Indian Territory, except such as are herein reserved from allotment, shall be appraised at their true value."

The only lands excepted are those reserved from allotment, found in Section 24. Manifestly, therefore, the act itself relates to all the lands of the Cherokee people.

Section 20 creates two estates of inheritance in the persons enrolled under the Act of 1902; First, in the allotted lands; Second, in their "proportionate share of other tribal property." Both of these estates descend to the heirs on the death of the original owner. This provision of the Act completely alters the ordinary tribal title. A child born prior to September 1, 1902, took nothing from his father or mother, but did take a property right in the tribal property equal to that of either of his parents. If born subsequent to September 1, 1902, he took no right in the tribal property, but became the heir of his parents and took their property by inheritance. In all cases of tribal property, a member of the Tribe dying dies out of his property

right, and his right reverts to the Tribe. No case has been produced, and we submit none can be produced, in which property held by tribal right was at the same time an estate of inheritance which descended to the heirs of a deceased member. It is impossible for an estate of inheritance vested in the individual member to be at the same time held by tribal right and revert to the tribe, as all tribal-right property must do upon the death of the member of the tribe.

The estate of inheritance in the lands is not of lands allotted, of which the party is in possession and for which he holds either a certificate as provided in Section 21, or a deed as provided in Section 58, but by the language of the act it is created in the undivided lands "before *receiving his allotment*" (in) "the lands to which such person would have been entitled if living"; these lands according to the act "shall be allotted in his name" (Sec. 20), though he be dead, and shall, "with his proportionate share of other tribal property, descend to his heirs." These allotments are to be selected for the dead, and in the name of the dead, out of the general mass of undivided Cherokee lands by the executor or administrator of the deceased person, and upon their failure to act then by the Dawes Commission. This settles the contention that no property vests in the individual Indian until it is selected by him, segregated from the balance of the property and a deed or patent issued to him therefor.

Section 26 provides that the names of all persons living Sept. 1, 1902, shall be placed on the roll by the Dawes Commission and no child born thereafter to a citizen and no white person * * * "shall be entitled * * * to participate in the distribution of the tribal property of the Cherokee Nation."

These children and white persons are not simply ex-

cluded from sharing in the allotted lands, but are absolutely excluded from participation "in the distribution of the tribal property of the Cherokee Nation," of any and every kind or description.

Section 31 excludes all persons not enrolled under the Act of 1902 and declares that those enrolled shall participate "in the distribution of the common property of the Cherokee Tribe."

Can any one pretend that the unallotted lands and undistributed funds are not a part of the "common property of the Cherokee Tribe"?

If they constitute a part of such property, can any one say the enrolled citizens were not vested with this part of the common property as completely as with any other part?

The Statute makes no distinction and the only way to make a distinction between the allotted lands and the other tribal property is to read words into the Statute which Congress never put there.

The proviso of Section 31 specifically excludes "the allotment of lands or *other tribal property*" being made to an enrolled person, or the heirs of such person, who died prior to Sept. 1, 1902. That shows clearly that the "common property of the Cherokee Tribe" mentioned in the previous paragraph of this Section, and which it requires shall be distributed to the enrolled citizens, embraced "the other tribal property" as well as the allotted lands of the Cherokees.

This Section further declares that the right of such enrolled person dying prior to Sept. 1, 1902, to any interest in the lands "or other tribal property" shall be extinguished and passed to the tribe in general upon his death, and any person receiving any portion of any such lands or "other tribal property" shall be guilty of a felony and

shall forfeit the lands and "other tribal property" so received by him.

Section 73 declares that the provisions of Section 13 of a certain Act of Congress relating to the leasing of oil lands, "shall not apply to, or in any manner affect the lands or other property of said tribe."

In the face of this oft-repeated language specifying at one time "the common property of the Cherokee Tribe" and at other times the allotted lands "and other tribal property," the defendants say that the Cherokees who were enrolled under the Act of 1902, and in whom this property is specifically vested, have no right in any portion of the common property except that which has been specifically allotted and is covered by a certificate of allotment and a deed of conveyance. On the other hand, we assert that each of the parties enrolled under the Act of 1902, by the very terms of the Act, became seised, in his individual right, of his entire proportionate share of the whole Cherokee property, of which 110 acres has been subsequently allotted to him and the remainder still continues undivided. The fact, however, that it has not been segregated and set apart to him cannot divest him of his title. He holds an undivided interest by exactly the same title that he holds the divided interest.

By the terms of the Act the Secretary of the Interior became the agent to appraise and allot the lands, to collect the revenues and pay the debts of the tribe and of the Cherokee National Government, and to complete the distribution of the property (Sections 9, 11, 22, 25, 64, 65, 66, 67), but he refuses to carry out the most essential portion of the Act, namely, to limit the allotment and distribution to the persons fixed by the Cherokee Agreement, and is proceeding to allot the lands and distribute the funds to other persons than those entitled to participate under the said Act—persons who by the terms of the agree-

ment were expressly prohibited from participating in the property, to wit, persons born after September 1, 1902.

There is no justification for the contentions that a prior date for closing the rolls had ever been fixed, as will appear from the Act relied on. The Secretary of the Interior had no authority to fix July 1, 1902, as the date for closing the Cherokee rolls, as will appear from Records of the Commission to the Five Civilized Tribes and from the Act of March 1, 1901 (31 Stat., 848). The negotiations for an agreement begun in 1894 were continued without cessation up to and including August 7, 1902, when the agreement was finally ratified and confirmed.

In support of defendants' right to allot lands and distribute funds to such after-born persons certain provisions of a later Act of Congress, to wit, Section 2 of the Act of April 26, 1906 (34 Stat., 137), as amended by the Act of June 21, 1906 (34 Stat., 325), are set up, and will be considered in their order.

It is important to note that the Act of 1902 sets forth completely the qualifications required of Cherokees for enrollment for allotment of lands and distributive shares of vested funds.

The Act of April 26, 1906, sets forth no qualifications for enrollment thereunder different from those of the Act of 1902, and reepals none of the provisions of the latter Act in relation thereto. Therefore any person to be enrolled under the provisions of the later Act must have the qualifications provided by the Act of 1902.

ACT OF APRIL 26, 1906, NOT INCONSISTENT WITH ACT OF JULY 1, 1902, AS TO QUALIFICATIONS FOR ENROLLMENT.

In so far as the Act of April 26, 1906, makes provision for additional enrollment of members of the tribe it is entirely consistent with the enrollment provisions contained

in the Act of 1902, because it admits no person to enrollment that did not possess all the qualifications required by the 1902 Act.

The Act of April 26, 1906, however, does extend the time within which applications may be filed by certain persons qualified under the Act of 1902.

In arriving at the correct interpretation to be given to these several Acts it is important to see exactly what the Act of April 26, 1906, provides with reference to

1. Filing applications for enrollment.
2. Receiving applications for enrollment.
3. Qualifications for enrollment.
4. Authority of secretary to enroll.

And while discussing the question it should be borne in mind that *enrollment for allotment* of members of the tribe under the Act of 1902 was entirely different and distinct from *census enrollment* of citizens of the Cherokee Nation.

The Cherokee citizenship rolls contained the names of thousands of persons who were not members of the tribe and who were not entitled to enrollment for allotment. Citizenship in the nation did not make the citizen an owner of tribal property (Intermarriage Cases 203 U. S., 76).

Section 30 of the Act of 1902 provides that the application of no person for enrollment for allotment in the Cherokee tribe shall be received after October 31, 1902.

This did not prevent persons claiming to be members of the tribe and entitled to enrollment for allotment from continuing to *file applications* thereafter, as clearly appears from Sections 1 and 2 of the Act of April 26, 1906; but it did prevent the Secretary of the Interior from *receiving* and approving such applications for enrollment, and that without reference to whether the names of the applicants already appeared on a tribal roll or not.

Examining Section 1 of the Act of April 26, 1906, with

the foregoing facts in view, it will be seen that the section provides that the Secretary may enroll Cherokees whose applications for enrollment for allotment were *filed* at any time before December 1, 1905, provided it appear from the records of the Commission that their names had been on a *tribal* roll and that their applications for enrollment for allotment had not been allowed *solely* for the reason that the applications were not filed within the time prescribed by law (*i. e.*, by October 31, 1902).

This section prohibits the enrollment of all Cherokees after April 26, 1906, save and except such as, having the necessary qualifications, had filed application before December 1, 1905.

The Section contains no instructions or directions to the Secretary as to the qualifications required of these applicants; and therefore he had no authority to enroll any of such applicants as did not possess the qualifications required under existing law, to wit, the Act of July 1, 1902.

Section 2 provides that for ninety days after approval of the Act *applications for enrollment shall be received* by the Secretary of the Interior of certain minor children of the Choctaw, Chickasaw, Creek and Cherokee Tribes.

This Section contains no instructions or directions to the Secretary as to the qualifications of these minor children, save only that they must be children of enrolled members of one of the respective tribes, or of parents who have applications for enrollment pending.

The Act says that "allotments shall be made to children so enrolled." This language clearly means that such of those persons, whose applications were received within the time stated, as are found to be entitled to enrollment, shall receive allotments.

The proviso, however, contained in this Section, forbids Cherokee children from *filing an application* after

April 26, 1906, because the Cherokee tribe then had an agreement with the United States fixing the date for filing applications.

Thus under Section 2 the Secretary is instructed to *receive* applications of these Cherokee minors, if the applications were on file April 26, 1906, and to such of the applicants as might be qualified under existing law, he was directed to make allotments. But all other Cherokee minors, even though they might possess the same qualifications as those who had filed applications by April 26, 1906, were by this section of the Act forbidden even to *file applications;* so that the effect of Section 2 was to make it possible for Cherokee minors who were living on March 4, 1906, and had filed their applications prior to April 26, 1906, and had the other necessary qualifications, to require the Secretary of the Interior to pass upon their applications and to enroll them for allotment, whereas such Cherokee minors as had not filed applications by April 26, 1906, were by the Act deprived of the opportunity even to have their qualifications passed upon by the Secretary of the Interior.

Both these classes, it is evident, must have had all the ownership qualifications required by the Act of July 1, 1902, because up to April 26, 1906, the Act of 1902 was the *only law* under which any applications could even be *filed* for enrollment for allotment in the Cherokee tribe.

Section 16 of the Act of April 26, 1906, provides that when allotments have been made to all members of the Cherokee tribe, the residue of the lands, not reserved or otherwise disposed of, shall be sold by the Secretary and the proceeds deposited in the Treasury *to the credit of the tribe.*

Section 17 provides that after so selling the surplus lands and depositing the proceeds in the Treasury of the United States to the credit of the tribe, and after paying

all debts or charges against the fund, the balance "shall be distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved roll" of the tribe.

On April 26, 1906, the "members of the tribe" were those persons enrolled, or to be enrolled, under the Act of July 1, 1902, and none other.

Thus it is seen that the Cherokee funds in the Treasury of the United States were not tribal property in the sense that they were to be distributed, as other tribal property always is, namely, *per capita* to the members living at the time fixed for distribution, but that it was a fund to be distributed per capita among those whose names appeared upon the finally approved roll, except where any such enrolled person was dead, and then that the share of such deceased member was to be paid to his heirs.

As shown above, the only Cherokee roll then authorized was the roll made, or being made, as of September 1, 1902, and there was no law then existing which even attempted to authorize the enrollment of any Cherokee who did not possess all the qualifications for enrollment required by the said Cherokee allotment Act.

The Act of April 26, 1906, is a *general act* "to provide for the final disposition of the affairs of the Five Civilized Tribes," an act to hasten the completion of rolls, finish the allotments, sell the surplus lands, pay the debts and distribute the surplus. It is not an enrollment act, but, so far as the Cherokees are concerned, an act to prohibit the enrollment of all persons except those provided for by the Act of July 1, 1902; but it extends the time to December 1, 1905, and to April 26, 1906, respectively, for two classes of persons who would have been enrolled under the Act of July 1, 1902, had their applications been received within the time prescribed by that act. This act contains no direc-

tions or instructions to the Secretary of the Interior as to what must be the qualifications of the persons to be enrolled within the extended time, but leaves those qualifications as they were under the provisions of the Act of July 1, 1902, and none of the said qualifications was more definite and distinct, and none more important, than the one providing that Cherokees to be enrolled must have been living on September 1, 1902.

The crucial tests of the Cherokee Agreement with reference to enrollment were Cherokee blood, recognized membership in the tribe and that the person to be enrolled be living on September 1, 1902.

Summing up the provisions of the Act of April 26, 1906, relating to the enrollment of Cherokees, we find:

1. That there is no express repeal of any part of the Act of July 1, 1902, declaring that no person born after September 1, 1902, shall be enrolled as a member of the Cherokee tribe or participate in the tribal property.

2. No authority is given to the Secretary of the Interior to disregard any of the requirements contained in the said Act of July 1, 1902, with reference to the qualifications required of applicants for enrollment, save only that the applications may be filed later than October 31, 1902.

3. That Section 1 of the Act authorizes the Secretary of the Interior to enroll certain Cherokees possessing the necessary qualifications, whose applications were filed before December 1, 1905.

4. That Section 2 authorizes the Secretary of the Interior to *receive* applications for enrollment of certain Cherokee minors, if those applications were filed prior to the date of the approval of the Act, and to allot lands to such of the applicants as possessed the necessary qualifications, namely, those required by the Act of July 1, 1902,

one of which was that the applicant must have been living September 1, 1902.

5. That Section 2 denies the same class of Cherokee minors, if they had failed to file their applications before the approval of the Act, the right to file applications *thereafter* for enrollment with the Secretary, even though possessing the same qualifications as the minors who had filed their applications before the approval of the Act.

6. That Sections 16 and 17 direct the Secretary of the Interior to distribute the Cherokee funds per capita among the members of the tribe then living and the heirs of deceased members whose names appear upon the finally approved roll, which roll must have been the roll made in conformity with the Act of July 1, 1902, thus showing conclusively that the funds in the Treasury were not regarded as tribal funds, in the usual sense of the term, but were the property of the members enrolled as of September 1, 1902, with estates of inheritance therein.

Therefore the Secretary must look to the Act of July 1, 1902, for the essential qualifications of, and for his authority to enroll, those provided for in Sections 1 and 2 of this Act of April 26, 1906.

THE AMENDMENT OF JUNE 21, 1906.

The Act of June 21, 1906, amends Section 2 of the Act of April 26, 1906,

> "By striking out thereof the words 'provided further, that nothing herein shall be construed so as to *hereafter* permit any person to file an application for enrollment in any tribe where the date for filing applications has been fixed by agreement between said tribe and the United States' "

the effect of which is to permit Cherokee minors of the class named in Section 2 who had not filed their applications for enrollment prior to the approval of the Act of April 26, 1906, to file such applications at any time within ninety days from that date, and to be enrolled, if the Secretary should find that they possessed the necessary qualifications for enrollment as provided by the Act of July 1, 1902.

In other words, the amendment merely removes the prohibition contained in Section 2 against the *filing* of applications by that class of Cherokee minors described therein, who had filed no applications prior to the approval of the Act of April 26, 1906, and puts them on equal terms with such like minors as had filed their applications before that time, and authorizes the Secretary to *receive* their applications, and thus enable him to pass upon their qualifications for enrollment.

But neither Section 2 nor the amendment changes the law governing the requirements for enrollment of any person in the tribe, which requirements, as said above, are to be found only in the Act of July 1, 1902, namely, that the applicant must be of Cherokee blood, a member of the tribe, and *living September 1, 1902.*

There are three distinct classes of persons provided for by the Act of April 26, 1906, as originally passed and as amended by the Act of June 21, 1906, but all persons included in these three classes must have the ownership qualifications required by the Act of July 1, 1902, because the Acts of 1906 do not repeal the provisions of the Act of July, 1902, and contain no specific provisions setting forth any qualifications of applicants for enrollment in conflict with those declared in the Act.

Counsel therefore maintain that so far as pertains to the enrollment of Cherokees the Act of April 26, 1906, is in

all respects consistent with the Act of July 1, 1902, and repeals none of its provisions relating to the rights of members of the Cherokee tribe to participate in the allotment of lands and distribution of other tribal property, and that the Acts of 1906 relied upon by the Secretary of the Interior, properly construed, do not authorize the enrollment for allotment of Cherokee children born after September 1, 1902.

THE ACT OF APRIL 26, 1906, AS AMENDED DOES NOT REPEAL THE ACT OF JULY 1, 1902.

Now even if facts had been alleged in the bill sufficient to bring the case within the purview of the Act of June 21, 1906, counsel submit that Section 2, of the Act of April 26, 1906, as amended by the said provision of the Act of June 21, 1906, does not repeal those sections of the Act of July 1, 1902, which provide that no person born after September 1, 1902, shall receive an allotment of Cherokee land and a distributive share of other tribal property, but that the same are in fact consistent therewith.

The Act of July 1, 1902, is "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of the townsites therein, and for other purposes," and relates *exclusively* to the Cherokees.

It is a special Act.

On the other hand, the Act of April 26, 1906, is "An Act to provide for the final disposition of the affairs of the *Five Civilized Tribes* in the Indian Territory, and for other purposes," and, therefore, includes the Choctaws, Chickasaws, Creeks and Seminoles.

It is a general Act.

These two Acts, one special and the other general, should, if possible, be so construed as to make them consistent the one with the other, for it can not be held that the gen-

eral Act of 1906 repeals the special Act of 1902, without violating the most fundamental rules of statutory construction.

In Rogers vs. the United States, 185 U. S., 83, where the question under consideration by the Court was as to whether the provisions of a special statute, or the subsequent repugnant provisions of a general statute, should prevail, it is stated on page 82:

> "Section 13, in general terms, and language there used, does not indicate that it was the intention of the Congress to abrogate the special provisions made in Section 7 for the rear admirals embraced in the nine lower numbers of that grade; and special provision having been made for them, it cannot be held that a subsequent general statute, much less in the same act, was intended to alter or repeal the special provision so made."

"REPEALS BY IMPLICATION NOT FAVORED."

> "Nothing is better settled than that repeals, and the same may be said of amendments, by implication, are not favored by the Courts, and that no statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction."
>
> Cope vs. Cope, 137 U. S., 682, 686.

> "Of course the settled rule undoubtedly is that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction."
>
> Ward vs. Race Horse, 163 U. S. 504-511.

The construction of the General Act of 1906 (amended) adopted by the lower court would make it repeal the following essential provisions of the Special Act of 1902:

"Section 26. The names of all persons living on the first day of September, 1902, entitled to be enrolled as provided in Section 25 hereof, shall be placed upon the roll made by said commission, and no child born thereafter to a citizen * * * shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation."

"Sec. 31. No person whose name does not appear upon this roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee Tribe, and those whose names appear thereon shall participate in the manner set forth in this Act."

"Sec. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, 1902, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs, according to the laws of descent and distribution as provided in Chapter 49 of Mansfield Digest of the Statutes of Arkansas."

And would likewise make it repeal Section 21 of the Act of June 28, 1898 (30 Stat., 503).

So much of Section 2 of the Act of April 26, 1906 (amended), as applies to enrollment of members of the Choctaw, Chickasaw, Cherokee and Creek Tribes, reads as follows (omitting non-essential portions):

"Sec. 2. That for ninety days after approval hereof application shall be received for enrollment of children who were minors living March 4, 1906, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee and Creek Tribes, or have applications for enrollment pending at the approval hereof, and for

> the purpose of enrollment under this section, illegitimate children shall take the status of the mother, and allotments shall be made to the children so enrolled."
>
> * * * * * * * * *
>
> "Provided, that the rolls of the Tribes affected by this Act shall be fully completed on or before the 4th day of March, 1907, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date.
>
> "Provided further, that nothing herein shall be construed so as hereafter to permit any person to file an application for enrollment or to be entitled to enrollment in any of said tribes, except for minors, the children of Indians by blood, or of Freedmen members of said tribe, or of Mississippi Choctaws identified under the 14th article of the treaty of 1830, as herein otherwise provided, and the fact that a name of a person appears on the roll of said tribe shall not be construed to be an application for enrollment."

There was no express repeal of the allotment provisions of the Cherokee Allotment act contained in the act of April 26, 1906, but on the contrary there was a proviso in the act that showed clearly and unmistakably the intention of Congress to avoid repeal thereof.

And it is to be presumed that this amendment of the Act of April 26, 1906, enacted within sixty days thereafter, was not intended by Congress to repeal such an important system and schedule of law as the allotment Act of 1902, without, in express terms, declaring that such repeal was intended.

In the case of Red Rock vs. Henry, 106 U. S., 596, it is said:

> "The result of the authorities cited is, that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless

> the latter statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest."

The Acts of 1906 contain no express declaration of a purpose to repeal any part of the act of 1902, and, as shown herein, the two acts are not irreconcilable, if the second (as amended) be construed to include only those persons living on March 4, 1906, *who were likewise living on September 1, 1902.*

The Act of April 26, 1906 (amended), standing alone, while providing that "allotments shall be made to children so enrolled" does not direct what an allotment shall consist of nor out of what lands the allotment shall be made; it does not direct the Secretary as to what applications made thereunder shall be approved, nor what applicants shall be enrolled. It does not instruct the Secretary in terms even to receive applications for enrollment of "children born to enrolled Cherokee parents between September 1, 1902, and March 4, 1906," much less to admit such children "to participate in the allotment and distribution of the tribal lands and funds." Indeed, it does not give any directions whatever as to what the Secretary shall do with such applications for enrollment when received. Therefore the Secretary must look to the Act of July 1, 1902, for his authority to enroll.

The qualifications of a Cherokee citizen entitling him to participate in the allotment of lands and distribution of other tribal property, are clearly set forth in Sections 20, 25, 26, 27, 28 and 31 of the Act of July 1, 1902; and if the qualifications of applicants under Section 2 of the Act of April 26, 1906 (amended), be found to exist as provided in the said sections, then, and not till then, "allotments shall be made to children so enrolled."

In other words, this latter section sought merely to extend the time for filing applications for enrollment of that class of persons who were minors living March 4, 1906, qualified in all respects under the Cherokee Agreement.

A list of this class actually enrolled thereunder is to be found in Public Document, "The Final Rolls of Citizens and Freedmen of the Five Civilized Tribes in Indian Territory," compiled and printed under authority conferred by the Act of Congress, approved June 21, 1906 (34 Stat. L., 325). The following are some of the names included: Newell Huff, Ross Johnson, Louisa Kelly, Andrew A. Johnson, Orville O. Osborne and Emmett Smith, all of whom were living September 1, 1902.

Thus construed, the Act of April 26, 1906, as amended, repeals none of the provisions of the Act of July 1, 1902, defining allotment qualifications of Cherokee citizens; it adds no one to the Cherokee allotment roll that did not have the necessary legal qualifications for enrollment on September 1, 1902, and it maintains the system of allotment provisions which is consistent alike with the acts of Congress and with the former Cherokee Constitution and laws relating thereto.

CONSTRUCTION GIVEN BY SECRETARY MAKES SECTIONS OF THE ACT OF 1906 INCONSISTENT WITH EACH OTHER.

The Secretary's construction of the Act of April 26, 1906, as amended, renders Section 2 thereof entirely inconsistent with the provisions of Sections 16 and 17 of the same act, which latter sections direct the Secretary of the Interior to dispose of the unallotted lands and the lands reserved from allotment, deposit the proceeds in the Treasury of the United States to the credit of the tribe and, after paying all just charges against the fund, to distribute

the remainder "per capita to the members then living and the heirs of the deceased members whose names appear upon the finally approved rolls of the respective tribes."

It is clear that the intention as to the Cherokees was that this distribution should be made per capita to the persons enrolled as of September 1, 1902, and the heirs of deceased members whose names appeared upon that roll, because no other Cherokee roll at that time had ever been contemplated.

ERROR OF THE COURT AS TO EQUALIZATION.

The court seems to have fallen into a strange error in placing an interpretation upon the intention of Congress with regard to *equalizing* the conditions of the persons referred to in Section 2 of the Act of 1906.

It certainly would not be *equalizing* the shares of two children in the same Cherokee family to give one 110 acres of the average value of allottable lands and to give another child, born a little later, double this value of land in cash, together with the same right of inheritance that the first child had.

Moreover, if the Act of April 26, 1906, be taken as determining the question, it is evident that Congress did not intend to give the persons therein provided for a share of tribal property equal to that due those enrolled under the act of July 1, 1902, because the act of 1906 says that if such person fail to receive the *full quantity* of land to which he would be entitled under the allotment, he shall be paid out of any funds of the tribe a sum equal to *twice the appraised value* of the land *thus deficient*.

At the time this provision of the statute was enacted there were no citizens (members) of the Cherokee Tribe entitled to an allotment except persons enrolled under the act of July 1, 1902, as of September 1, 1902, and therefore there

was not in contemplation any provision for equalizing the allotments of 5,000 after-born children, but only the filling out of any deficiency in the allotments of persons enrolled as of September 1, 1902, where such allotments were partial, or not fully equal in value to 110 acres of the average allottable lands of the Cherokee Nation.

This provision was intended for persons enrolled as of September 1, 1902, to cover any deficiencies in the full allotment acreage that might arise by reason of the individual selections of allotment falling short of the full quota of 110 acres of average allottable lands.

It was competent to the allottees to select their allotments in a score or more separate tracts, and it might very well happen that the aggregate of these would not equal exactly the equivalent of 110 acres of average allottable lands. Therefore the necessity for this corrective provision in the act of 1906. It was not intended to repeal the act of 1902, but was intended to supplement it, and to render it possible for the Secretary of the Interior to execute the act of 1902 in the utmost detail.

There is nothing in this record that would justify the conclusion that an allotment of land was worth double its appraised value. The natural conclusion, in the absence of any proof to the contrary, would be that the allotment was equal to its appraised value. In other words, that it was appraised at its actual value. If there is any presumption to be indulged on the subject in considering these demurrers, certainly the allegations of the bill must be taken in preference to any surmise. The bill alleges that the 4,000 allotments in question were reasonably worth $4,400,000, which was a very different estimate from that suggested in the court's finding.

According to the court's contention it would appear that children are still being born into the Cherokee Tribe, and

that this condition has continued since September 1, 1902, in the same manner and with the same effect as to property rights as previously.

In this aspect of the case it makes the contention that Congress had it in mind to equalize the shares of after-born children a strange one, in view of the fact that no provision is made for the children born *since* March 4, 1906, and that all children born to enrolled Cherokee parents between September 1, 1902, and March 4, 1906, lost their communal right if they died between those dates.

MATERIAL FACTS TO BE CONSIDERED IN CONNECTION WITH THE PASSAGE OF THE ACTS OF 1906.

The report of the proceedings in the House of Representatives while the bill was there pending show that so far from Congress having before it data to indicate that there would be a *surplus* of Cherokee lands after allotment to those applying for enrollment under the Act of 1902, Mr. Curtis, of Kansas, who had charge of the bill, then and there, submitted a report to the House showing that there would be a *deficit of about 1200 allotments.*

> Cong. Rec., Vol. 40, No. 27, p. 1235 (July 18, 1906).

And if the court should deem it of sufficient importance to examine the annual reports of the Commissioner to the Five Civilized Tribes, since that time, it will be seen that the deficit actually continued, and that there are now over 300 persons enrolled as of September 1, 1902, who are deprived of allotments of land by reason of the lands having been taken and held for the after-born children for whom the Secretary of the Interior is claiming allotment rights under the provisions of the said Act of June 21, 1906.

ADMISSION OF 5000 ADDITIONAL ALLOTTEES NOT CONTEMPLATED BY CONGRESS IN 1906.

If Congress had intended by the Act of April 26, 1906, as amended, to permit persons born after September 1, 1902, to file applications for enrollment, it would doubtless have said so *in express terms*, as was done in the case of the Choctaws, Chickasaws, Creeks and Seminoles (33 Stat., 1071).

That Congress knew how to express itself is evidenced by the language it uses in the Indian Appropriation Act of March 3, 1905 (33 Stat., 1048). At page 1071 it authorizes the enrollment of certain children of four out of the Five Civilized Tribes. It first provides as to the Choctaws and Chickasaws for the filing of applications of infants born *prior* to Sept. 25, 1902, living on said date, to enrolled citizens by blood. Next it provides for the filing of applications for children born *subsequent* to Sept. 25, 1902, and *prior* to March 4, 1905, living on said latter date and born to citizens by blood of the Choctaw and Chickasaw Tribe whose enrollment had been approved. Next it provides for the filing of applications for enrollment of Creek children born *subsequent* to May 25, 1901, and *prior* to March 4, 1905, living on said date, to citizens of the Creek Tribe of Indians whose enrollments had been approved by the Secretary prior to the date of this act. Next it provides for the filing of applications for enrollment of infant children in the Seminole Tribe born *prior* to March 4, 1905, and *living* on said date, to citizens of the Seminole Tribe whose enrollment has been approved. Congress clearly makes the distinction between children born subsequent to certain dates and those not born subsequent to certain dates. It provides that no child of the Choctaw and Chickasaw Tribes shall be enrolled unless they are the children of citizens by *blood*. In providing

for the filing of applications by the Creeks and Seminoles no such limitation is affixed. In the Choctaw and Chickasaw and Creek Tribes any such children enrolled are to receive allotments only. In the Seminole Tribe any such children enrolled shall receive "each an equal number of acres of land, and such children shall also share equally with other citizens of the Seminole Tribe in the distribution of other tribal property and funds." In the case of the Cherokees it cannot be pretended that the Act specifically declares that children born since Sept. 1, 1902, are to be enrolled. The Cherokee National Council Sept. 25, 1905, passed a resolution, "for the participation of all children born since Sept. 1, 1902, and prior to March 4, 1906, * * * and that said participation should, if possible, be equal in every respect in the lands and moneys as provided by said Act of Congress." With this language before them Congress absolutely refused to pass such an Act and it also failed to provide that such children should participate in the funds of the Cherokee Nation in direct contrast with a provision of that kind for the Seminole children under the Act of 1905 above quoted. The Act of April 26, 1906, also limits the payment of money to those persons only who having received a portion of their allotment, failed to receive the full quantity of land in value. In spite of these limitations, the Department of the Interior has enrolled children born since Sept. 1, 1902, and where no allotment is made to them, it purposes to give them double the total amount of the value of an allotment and also their distributive share of the Cherokee funds.

Especially is this clear if certain so-called representatives of the Cherokee National Government were at the time appealing to Congress to open the rolls and admit to enrollment for allotment children born since September 1,

1902, and to enroll them as of that date, an allegation which the trial court refers to and rejects in its opinion (Rec., 26).

The positive prohibition contained in the Act of April 26, 1906, as originally passed, shows conclusively that it was not the intention of Congress that any such result should be accomplished.

When Section 2 of the Act of April 26, 1906, was being considered in the House, Mr. Curtis, of Kansas, had charge of the bill. He stated as follows:

> "I will state to the gentlemen, as I have stated before, the status of the Indian children. Their applications have all been filed, they are all on file now, and there is no question about the children, and they have until the 4th of June to act upon their applications, and I will state that nearly all of them have been passed upon. I gave the figures a few minutes ago.
>
> "There is no question about the children. As I stated before, the Act which we passed some time ago provided for their enrollment, and the applications of nearly all have been filed and most of them acted upon."
>
> (Vol. 40, No. 27 Congl. Record, p. 1235, Jan. 18, 1906.)

The insertion of the word "*hereafter*" in the proviso to Section 2 of the Act of April 26, 1906, which was made while the Bill was under discussion on the floor of the House; and the statements made by Mr. Curtis at the time, as reported in the Congressional Record, show clearly that it was the intention of Congress to exclude all persons from filing applications *after April 26, 1906,* and prevents the defendants from successfully maintaining the contention that the Amendment of June 21, 1906, opened the rolls to persons born after September 1, 1902.

On August 22, 1911, Congress passed the following joint resolution:

[Public Resolution—No. 11.]
[H. J. Res. 141.]

Joint Resolution to authorize the Secretary of the Interior to make a per capita payment to the enrolled members of the Choctaw, Chickasaw, Cherokee, and Seminole Indians of the Five Civilized Tribes entitled to share in the funds of said tribes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to make a per capita payment to the enrolled members of the Choctaw, Chickasaw, Cherokee, and Seminole Indians of the Five Civilized Tribes entitled under existing law to share in the funds of said tribes, or to their lawful heirs, out of any moneys belonging to said tribes in the United States Treasury, or deposited in any bank, or held by any official under the jurisdiction of the Secretary of the Interior, said payment not to exceed fifty dollars per capita and to be made under such regulations as he may prescribe: *Provided*, That in cases where such members are Indians whose restrictions have not been removed the Secretary of the Interior may in his discretion withhold such payment and use the same for their benefit.

Approved, August 22, 1911.

This enactment of Congress is wholly inconsistent with the contention that it was the purpose of Congress in the act of April 26, 1906, as amended, to give to each Cherokee child living on March 4, 1906, whose parents had been enrolled, or had applications for enrollment pending, at the date of the approval of the act twice the appraised value of an allotment of land where such child could not receive the allotment in kind.

There was not enough land to give 5,000 additional allotments and there would not have been enough money in the Treasury of the United States to equalize those allotments that were short and to give the unallotted persons double the appraised value thereof in money.

CITIZENSHIP DID NOT CONFER OWNERSHIP OF LANDS AND FUNDS.

Justice Stafford declares that the right of the enrolled citizen to both the surplus acres and surplus funds, "was by virtue of their citizenship" (R., 27), and speaking of the Act of 1906, he says, "the provision amounts to an enlargement of the definition of citizenship."

We respectfully deny that plaintiffs' rights depend upon citizenship in the Cherokee Nation as a body politic. That question was decided in the Cherokee Intermarriage Cases (203 U. S., 76). At page 85, Chief Justice Fuller declares, "Under the policy of the Cherokees, citizenship and communal ownership were distinct things." At page 86, he states:

> "The contention that the words 'citizens of the Cherokee Nation' should be construed as relating to the Constituional provision of 1839, that the lands of the Nation should be common property, is without merit in view of the provisions themselves."

At page 88:

> "And the same distinction between citizens as such and citizens with property rights has also been recognized by Congress in enactments relating to other Indians than the Five Civilized Tribes."

On page 89:

> "The idea therefore existed both in the minds and in the laws of the Cherokee people, that citizenship did not necessarily extend to or invest in the citizen

> a personal or individual interest in what the Constitution termed the 'common property,' the 'lands of the Cherokee Nation.' "

Quoting from Stevens vs. Cherokee Nation, the Chief Justice says:

> "It may be remarked that the legislation seems to recognize, especially the Act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former."

And quoting also from 40th Ct. of Cls., he says:

> "It cannot be supposed for a moment that Congress intended by this legislation to take away from some of the Cherokee people property which was constitutionally theirs or to confer upon white citizens property which they were not legally entitled to have, the term 'citizens' in these Statutes of the United States must be construed to mean those citizens who were constitutionally or legally entitled to share in the allotment of the lands."

On page 92 the Chief Justice refers to the fact that by the Act of 1902, certain restrictions upon enrollment are provided and that "in all other respects the roll was to be made in compliance with Section 21 of the Act of Congress of June 28, 1898, and of the Act of Congress of May 31, 1900." The Act of May 31, 1900 (31 Stat., 221-236), as quoted by the Chief Justice, prohibits the Dawes Commission from receiving, considering or making any record of a person who has not been a recognized citizen of the tribe and duly and lawfully enrolled or admitted as such. He then refers to Section 31 of the Act of July

1, 1902, which states that the persons enrolled shall be entitled to participate in the distribution of the common property of the Cherokee Tribe and those not enrolled shall not participate in any manner whatever in such distribution and says:

> "In other words, the roll must be made up of citizens, *who under the laws of the Cherokee Nation* were entitled to participate in the distribution of the common property of the Cherokee Tribe."

> "As the attempted transfer of any part of an Indian Reservation secured by treaty, would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it" (Leavenworth, etc., R. R. vs. U. S., 92 U. S., 742).

> "We go further and say that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands and that no subsequent law, proclamation or sale would be construed to embrace or operate upon it, although no reservation were made of it" (Leavenworth, etc., R. R. vs. U. S., 92 U. S., 733).

TITLE COMPLETELY VESTED TO ALL CHEROKEE PROPERTY BY ACT OF APRIL 26, 1906, IF NOT UNDER ACT OF JULY 1, 1902, AND THEREFORE IF THE INTERPRETATION OF THE LATER ACT ADOPTED BY THE SECRETARY OF THE INTERIOR BE CORRECT, THE ACT AS AMENDED IS UNCONSTITUTIONAL.

The opinion of the court (Rec., p. 27) holds that as to the allotments of lands of 110 acres each, the rights of plaintiffs therein may well be taken as vested, and not affected by any subsequent legislation, but as to the unal-

lotted lands remaining after allotment provided for by the act no provision was made, and that therefore such surplus lands and the undistributed funds in the Treasury of the United States remained tribal property (Rec., p. 26).

This ignores the fact that the interest of the plaintiffs in the surplus lands and undistributed funds is fixed by language just as positive and absolute as that which provides for their individual allotments of land, and further ignores the significant, if not conclusive fact, that whatever the Act of July 1, 1902, lacked in definiteness of specification and direction to the Secretary of the Interior regarding the disposition that he should make of the surplus lands and of the funds in the Treasury of the United States, that defect was completely supplied by the provisions of the Act of April 26, 1906, whereby and whereunder he was not only specifically directed as to what disposition he should make of the surplus lands, but he was expressly directed in Sections 16 and 17 of the act as to the complete and final disposition of the entire proceeds arising from the sale of the lands, together with the invested funds in the Treasury of the United States, and was instructed to distribute such net proceeds of the funds, after paying all charges against the same, per capita to the persons enrolled as of September 1, 1902, and the heirs of such enrolled persons as were dead, the language of the act being

> "Any remaining funds shall be distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls of the respective tribes."

This shows as clearly as language could state it that plaintiffs acquired a vested interest of an inheritable character in the surplus lands and in the vested funds equal in rank with the title established and confirmed in them, under

the Cherokee Agreement, to their individual allotments, recognized by the trial court in its opinion as complete.

Therefore, if, as plaintiffs contend, the title to all of the Cherokee property did not become vested under the Act of July 1, 1902, there can be no question as to its having become completely vested under the Act of April 26, 1906, to the exclusion of all born subsequent to September 1, 1902.

Assuming that the Act of April 26, 1906, as amended by the Act of June 21, 1906, authorizes and directs the Secretary of the Interior to dispose of these remaining lands to children born after September 1, 1902, and living on March 4, 1906, as he has interpreted them, we submit that those Acts are in violation of the constitutional rights of the appellants.

If the Acts of July 1, 1902, and of April 26, 1906, vested the enrolled Cherokee allottees with the title to all the lands and all the funds of the Cherokees, then manifestly the Act of June 21, 1906, which seeks to take a portion of those lands and a portion of those funds and bestow them upon other persons than those enrolled under the Act of July 1, 1902, is in violation of the Constitutional provision.

The question, therefore, to be discussed, is whether by those two Acts the enrolled Cherokees under the Act of July 1, 1902, living on September 1, 1902, became vested with the right to all the lands and all the funds. If they did, the Act of June 21, 1906, as construed by the defendants, takes it away from them, and the Secretary of the Interior, in executing that Act, is an instrument in accomplishing the taking away of property of the appellants without due process of law; and the injunction should be maintained.

It has been shown that the lands of the Cherokees belonged to them as a community. The Act of July 1, 1902, when ratified forbade any further additions to the com-

munity, because it provided that those persons living on September 1, 1902, who were entitled to allotment, should be enrolled, and that they should share in the lands and funds of the tribe; and it provided further that no person born after September 1, 1902, should be entitled to share in the lands and funds of the tribe. By these two propositions, the one affirmative, the other negative, Congress declared as strongly as it could, that the community to which the property should belong was that community which existed on September 1, 1902, composed of persons who were to be enrolled in accordance with the terms of the Act of July 1, 1902.

Section 20 of the Act provides, as to the distribution of a decedent's property, that if an allottee should die after September 1, 1902, his allotment should descend to his heirs "together with his proportionate share of other tribal property." Thus the Act created for the first time among the Cherokees a right of inheritance in tribal lands, and declared that such person had a proportionate share in other tribal property.

The "other tribal property" consisted of the funds in the Treasury, and of the property reserved from allotment, and of that which might not be taken for allotment. Surely, if it was the purpose of Congress and the purpose of the Cherokees to admit strangers to share in the lands and funds who were not entitled to enrollment under the Act of July 1, 1902, it would not have been declared that any person had a proportionate share in "other tribal property."

Sec. 25 of the Act declares that the roll of those persons which should be made under its terms should constitute the final roll upon which the allotment and distribution of the property was to be made.

Sec. 26 declares that no child born after September 1, 1902, to an enrolled Cherokee, and no white person who had intermarried with a Cherokee citizen since the 16th day of December, 1895, should be entitled to enrollment.

Sec. 30 declares that no application for enrollment shall be received after October 31, 1902.

And, finally, Section 31 of the Act declares that no person whose name does not appear upon the roll prepared in accordance with the terms of the Act shall participate in the common property of the Cherokee Tribe, and that those whose names appear on that roll shall participate in the manner set forth in the Act.

Suppose that prior to the passage of the Act the roll had been prepared and that the Act had named the persons so enrolled to share in the lands and funds. Would the court not declare that there were rights vested in all the lands and all the funds of the tribe? Is the exclusive right weakened by the declaration of the Act that all the lands and all the funds should be shared by a class of persons, to be ascertained in accordance with the terms of the Act of July 1, 1902?

By what stronger language or in what plainer terms could Congress declare its purpose that only those Cherokees enrolled under the Act of July 1, 1902, who should be living on September 1, 1902, were to be the sole owners of all the lands and funds of the Cherokee tribe or nation.

And to this point, in connection with the question of the title—is no significance to be attached to the provision of the Act that every person accepting an allotment under its terms should be held thereby to relinquish all right, title and interest in allotments which were to be made under the terms of the Act to other Cherokees?

TENANTS IN COMMON.

Inasmuch, therefore, as the title was originally in the Cherokee people, as a community, and as the United States and the Cherokee people agreed that the community should

terminate on a given date, and that the lands and funds of the former community should belong to an identified class of persons, namely, the appellants in this case, and that no person born after September 1, 1902, should share, the appellants became certainly vested as owners in common with all the right, title and interest in and to all the lands and funds of the Nation.

At first blush it may seem to the court (it seemed so to the court below) that 37,561 persons are too many to be tenants in common. But we need not argue this as an original proposition.

In the Massachusetts case of Drew vs. Carroll, 28 Northeastern Reporter 148, a statute was considered by the Supreme Court of that State, when the present Mr. Justice Holmes was a member of that bench, which made all Indians citizens of the State, and gave the right to the Herring Pond Indians to have partition of their common lands, to be afterwards divided, and where a scheme of allotment through State officers was provided in the Act. It was held that immediately upon their being made citizens each Indian acquired an undivided right, title and interest in the lands, which he could mortgage even before partition was had.

Of course the important part of this opinion is the holding that the Herring Pond Indians became tenants in common of the lands which they had theretofore held as a tribe, before they were made citizens.

In the Iowa case of Webster vs. Reid, 1 Morris, 515, the court declared the Sac and Fox tribes could hold their lands as tenants in common.

If, therefore, the title to the property of the Cherokees became vested in the persons enrolled under the Act of July 1, 1902, and if the Acts of April 26, 1906, and June 21, 1906, authorized the Secretary of the Interior to take

those lands and convey them to persons born after September 1, 1902, there is certainly the taking of private property without due process of law, and therefore a violation of the Constitutional provision which the appellants have the right to invoke.

We have no sentimental interest in the prosecution of this demand, nor would we have in the defense. These 5,610 children were born to parents who had received or would receive allotments and who are yet to receive moneys out of the Treasury of the United States; and they are in no worse condition than tens of thousands of children who are born in the United States every day. But we have a positive aversion to the idea that Congress can, merely because a man is an Indian, break every contract it makes with him, and even take away his property, under its much vaunted plenary power.

RELATION OF THIS CASE TO INTERMARRIAGE CASES.

From the Cherokee Intermarriage cases (203 U. S. 76) it appears clearly that the political government of the Cherokees was in the control of the Intermarried White Citizens of the Cherokee Nation in 1902, and from the alleged action of the National Council in 1905, requesting the enrollment of after-born children, it would appear that the Government, so far as there was any Government, remained in the control of the same class of persons, for the following reasons:

When the Act of April 26, 1906, was passed the Cherokee Intermarriage Cases were pending on appeal in the Supreme Court of the United States. The Court of Claims had decided that the Secretary of the Interior had incorrectly interpreted the meaning of the Act of July 1, 1902, in admitting the Intermarried White Citizens to *enrollment*

for allotment, and in making tentative allotments of Cherokee lands to them.

Under these conditions a committee appointed by the so-called representatives of the defunct Cherokee Government requested that the rolls be opened and that the minor children of these Intermarried White Citizens of the Cherokee Nation and others be admitted to enrollment for allotment.

The Act of April 26, 1906, was passed forbidding such enrollment in express terms. Then followed the amendment of June 21, 1906.

The Secretary of the Interior saw in the amendment the possibility of a construction that would admit minor children of Intermarried Whites and others born since September 1, 1902, to enrollment, and that thereby he might confer upon them allotments that were then being held in suspense, abiding the outcome of the Intermarried Case in the Supreme Court of the United States.

The Supreme Court of the United States affirmed the decree of the Court of Claims, and the Intermarried White Citizens numbering about 3,000 were denied the right of allotment. As a result over 3,000 children of these Intermarried White Citizens were enrolled under the Acts of 1906, and received allotments of land, while the rolls show that only about 360 minor children of full-blood Cherokees were even *enrolled for allotment* under the 1906 Act, although there were over 8,000 full-blood Cherokees on the roll as made under the Act of July 1, 1902.

These facts appear from the Annual Reports of the Commission to the Five Civilized Tribes, which are Public Documents, and of which the court will take judicial notice.

So we see the ambiguity in the law resolved for the second time in favor of the Intermarried Whites, and the al-

lotments, denied to the parents, conferred by the Secretary of the Interior upon their children, in spite of the direct prohibition contained in the Cherokee Agreement, declaring that no person born after September 1, 1902, should participate in the allotment of those lands, and in spite of the entire absence of authority therefor in any later law.

AUTHORITIES.

Appellants rely especially upon the following cases:

The Cherokee Intermarriage Cases, 203 U. S. 76.
Jones vs. Meehan, 175 U. S. 1.
The Kansas Indian case, 5 Wallace 756.

In the Cherokee Intermarriage Cases the subject matter of the suit was the same as in this case and the questions involved are so similar as to make it authority.

The claimants there were in all essential respects the same persons as the claimants in this suit and based their rights upon the same Act of July 1, 1902.

The Secretary of the Interior had given the wrong interpretation to the Act of 1902 in that case, as he has given the wrong interpretation to the Acts of 1906 in this case. By such wrong interpretation he was attempting to confer property rights upon the Intermarried Whites in that case; by placing the wrong interpretation upon the Acts of 1906 he is attempting to confer property rights upon the children of those Intermarried Whites and others in this case, all of whom were denied such rights by the plain and express terms of the Act of July 1, 1902.

The case makes a clear distinction between the property rights of citizens of the Cherokee Nation and those of members of the Cherokee Tribe and determines this propo-

sition, that the property rights of the members of the tribe are to be ascertained from the Constitution, Laws and Treaties of the Cherokee people and not from Acts of Congress.

It is made plain from the decision that while Congress might legislate citizens into the Cherokee *Nation*, so long as the Cherokee National Government continued, it could not legislate members into the *tribe* with property rights in the tribal estate.

The fact that appellants' rights in the Cherokee property were vested under the Act of 1902 and were protected by the Constitution is evident from the following language, quoted with approval by Chief Justice Fuller from the opinion of the Court of Claims.

> "It cannot be supposed for a moment that Congress intended by this legislation to take away from some of the Cherokee people property which was *constitutionally theirs*, or to confer upon white citizens property which they were not legally entitled to have."

In calling attention to the provisions of Section 31 of the Act of July 1, 1902, which says that no person whose name does not appear on the (allotment) roll made under the Act of 1902, shall be entitled in any manner to participate in the distribution of the common property of the Cherokee Tribe, the court declares that the roll must be made of persons who, under the Cherokee law, were entitled to participate in the distribution of the common property of the tribe.

The Cherokee law relating to the distribution of the common property of the Cherokee Tribe is the Act of July 1, 1902.

In *Jones vs. Meehan*, 175 U. S. 1, is found a complete answer to the question raised by the Trial Court as to

whether the rights of appellants could vest under the Act of July 1, 1902, in the unallotted lands and the undistributed funds, it being admitted that their rights did vest in the lands actualiy set apart for allotment to them.

In the Jones vs. Meehan case Monsimo, the Red Lake Chief, a tribal Indian, who maintained tribal relations up to the date of his death, was granted 640 acres of land. The land was not surveyed or segregated from the rest of the property of the tribe during Monsimo's life, but after his death young Monsimo, his son and successor in the tribe, falling heir under the laws of the tribe to his father's property, had the land segregated, surveyed and set apart to him, and it was held by the Supreme Court in this case that the land was free from all control of the Secretary of the Interior and of Congress itself.

According to this doctrine, appellants acquired the same right, title and interest in the remaining unallotted lands that they took in the lands allotted to them, save only that their interest was an undivided interest instead of being one held in severalty.

In the *Kansas Indian case* (7 Wall., 737), where the question involved was the right of State authorities to tax the lands belonging to the Shawnee tribe of Indians, referring to the rights of these people as a tribe, it was said:

> "If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties and Laws of Congress."

So, whether it be a tribe, as in the case of the Kansas Indians, an individual, as in the case of Monsimo, or an aggregation of individuals, as in the case of the appellants, vested rights of Indians are protected by the Constitution, Treaties and Laws of Congress.

Without attempting to analyze and distinguish the numerous cases cited by defendants, we call attention to the fact that in none of them is the question of the *taking of property* involved; and in none of them is there involved directly the question of actual ownership of property granted or given under such an agreement as that contained in the Act of July 1, 1902.

In *Stephens vs. Cherokee Nation* (174 U. S., 445-488), decided May 15, 1899, the question involved was that of the rights of citizens in the Nation.

The court decided that Congress had the power to provide such means as it saw fit to inquire into and pass upon the question of the *fact of citizenship* in the Nation.

At the time this case was decided the tribal existence continued, and no provision had been made for allotting or distributing the lands of the Cherokee people.

Appellants admit the power of Congress to provide means for ascertaining who were the actual members of the Cherokee Tribe, as recognized by the tribal law, but deny the right or power of Congress to legislate into the tribe, with a right of ownership in tribal property, persons who were not in fact members of the tribe.

In *Cherokee Nation vs. Hitchcock*, 187 U. S. 294, there was involved no question of the taking of property. The court was construing the constitutionality of certain provisions of the Act of June 28, 1898. No vested property rights had been invaded. The Secretary of the Interior under the authority of the Act of June 28, 1898, was leasing certain tribal lands, which had not been allotted, which belonged to the tribe, and was paying the proceeds arising from such leases, not to 5610 members of the tribe, but

into the Treasury of the United States for the benefit of the whole tribe.

Since counsel for appellees have persisted in stating that this case was decided *after* the Act of July 1, 1902, was passed, it is only proper to call the court's attention to the fact that the opinion deals exclusively with conditions existing prior to the last named date, when the title to the property was in the tribe as a community.

The Lone Wolf case (187 U. S., 553-565) involved the right of Congress to allot or sell certain tribal lands of Indian Tribes with whom the United States had entered into a Treaty which declared that these lands should be reserved in common and that no Treaty for the cession of any portion of said reservation should be valid unless executed by at least three-fourths of all the adult males occupying the same. By a subsequent Act of Congress it was provided that the lands so reserved should be in part allotted and for the remainder $2,000,000 should be paid for the benefit of the Indians. In no sense whatever did this action of Congress involve the taking of the property of the Indians. The sole question in the case was whether the terms of the treaty between the United States and the tribe prevented Congress from subsequently changing the form of the investment for the benefit of the same Indians. On page 568, the court said:

> "Indeed, the controversy which this case presents is concluded by the decision in Cherokee Nation vs. Hitchcock, 187 U. S., 294, decided at this term, where it was held that full *administrative power* was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, *a mere change in the form of investment of the Indian tribal property.*"

For a guardian to change the form of investment is always permissible. For a guardian to take the property of the ward and bestow it upon others is never legal.

From the opinion of the court above partly quoted, it appears that the Lone Wolf case was concluded by the decision in the case of the Cherokee Nation vs. Hitchcock, 187 U. S., 294, and that case involved simply the administration of Indian property.

The facts in that case are that the Secretary of the Interior under the Act of June 20, 1898, was preparing to lease certain oil lands of the Cherokee Nation and reserving a proper royalty therefrom. Attorneys for the Cherokee Nation brought suit and insisted that the Nation had such a complete title to the lands that said lands and the oil and other minerals found in them, were wholly exempt from the administrative control of the Secretary of the Interior. The case involved solely the question of administration of tribal property. The court stating the grounds of demurrer declared that the reasons embodied in a statement filed with the demurrer, set out:

> "1. The matters named in the bill are matters of *administration*, which cannot be taken away from an executive department and carried into the courts" (p. 299).

Again the court says:

> "It results from the doctrine of the decisions of this court that the demurrer was properly sustained, because of the fact that the matters named in the bill were matters of *administration*" (p. 306).

And further the court declares:

> "There is *no question* involved in this case *as to the taking of property;* the authority which it is pro-

> posed to exercise, by virtue of the Act of 1898, has relation merely to the control and development of the tribal property, which remains subject to the *administrative* control of the government" (pp. 307-8).

In *Wallace vs. Adams,* 204 U. S., 415, the question of citizenship alone was involved. This case was decided on February 25, 1907. The question involved was the constitutionality of the law creating a court to ascertain and determine the right of citizenship in the Choctaw and Chickasaw Nations. Hill had been enrolled as a citizen of the Choctaw Nation and had selected land and taken possession thereof. The same land was subsequently claimed by another person recognized as a member of the tribe.

The question of Hill's right to citizenship in the tribe was raised anew and submitted to the citizenship court. The former judgment of another court declaring Hill a citizen was overruled and upon this Hill appealed.

The only question, therefore, involved is that of a vested right in citizenship.

Appellants do not deny that Congress might at any time have purged the roll of September 1, 1902, had it been found to contain the names of persons not entitled to enrollment according to the Cherokee law.

In *Conley vs. Ballinger,* 216 U. S., 84, the opinion was rendered at the October term, 1909. The doctrine declared was similar to that in the Lone Wolf Case.

The property involved was a tract of land belonging to the Wyandotte tribe of Indians, but the title to which was in the United States. The land had been set apart by the Wyandottes to be used as a burial ground. It is situated in the center of a large and populous city in the State of Kansas. The Wyandotte Indians have long since ceased to reside in that section of the country, and as early as 1855

had ceded all the rest of their lands to the United States to be allotted among the individual members of the tribe. It is held by the court that Congress had the power to sell the property for the benefit of the members of the tribe.

The Act of Congress involved provided that the money derived from the sale of the land in question, the cemetery, should

> "be paid per capita to the members of the Wyandotte Tribe of Indians who were parties to the said Treaty (1855), their heirs or legal representatives."

This is exactly what appellants are contending for in the case at bar, viz., that the Secretary pay the proceeds of the sale of the property in question *to the parties to the agreement of July 1, 1902, their heirs or legal representatives.*

The real point of the decision in Conley vs. Ballinger is on page 91, as follows:

> "We are driven to the conclusion that even if the suit is not to be regarded as a suit against the United States within the authority of the cases cited, 202 U. S., 60 and 473, the United States retained the same power that it would have had if the Wyandotte Tribe had continued in existence after the treaty of 1855, that the only rights in and over the cemetery were tribal rights, and that the plaintiff cannot establish a legal or equitable title of the value of $2,000, or indeed any right to have the cemetery remain undisturbed by the United States" (Conley vs. Ballinger, 216 U. S., pp. 84, 90-1).

The power of *administration* over tribal property, which is all that is claimed in the cases above quoted, is, of course, a totally different proposition from that of transferring the title of valuable property from one person to

another merely by Act of Congress. That *Indians* enjoy the *protection* of the *Constitution* is declared by this court in the Kansas Indian case in this language, *supra*:

> "If they have outlived many things, they have not outlived the *protection afforded by the Constitution*" (Kansas Indian case, 5 Wall., 737, 755-6, italics ours).

Surely the Indian must be a person and the fifth amendment to the Constitution declares, "nor shall any person be deprived of life, liberty or property without due process of law." If an Indian is not a person within the meaning of the Constitution, and it should be now for the first time determined by this court that his property may be taken from him without due process of law, it necessarily follows that his life and liberty may also be taken without due process. His life, liberty and property are all embraced in the same provision of the Constitution. The words are just as clear and strong for the protection of his property as they are for his life or liberty. If he is not a person within this provision so far as property is concerned, neither is he a person so far as life and liberty are concerned. The Cherokee Indians are all citizens of the United States and we submit that the courts will certainly go a long way in their effort to dominate and control Indian property if they ever hold that a citizen of the United States, even though of the Indian race, may be deprived of his life, liberty and property because he is not a person within the meaning of the Fifth Amendment to the Constitution.

CONCLUSION.

From the foregoing it therefore appears that on July 1, 1902, the Cherokee Tribe, as a community, owned all the common property of the Cherokee people, both lands and

funds, holding the same in fee simple by communal title, whereby every member of the tribe was an equal owner with every other member so long as he lived, and when he died his share of the estate passed to the tribe.

Citizens of the Cherokee Nation, *as such citizens,* on the other hand, were not owners of this property, although they possessed the right by reason of their Cherokee citizenship, to *enjoy the use* of the property so long as the Government of the Cherokee Nation might last, and the property remain unallotted, as shown in the Intermarriage Cases above cited.

In other words, *citizenship* in the Nation did not carry with it the right of ownership; but *membership* in the tribe did.

By the Act of July 1, 1902, the communal ownership of the members of the tribe was converted into individual ownership; and the date fixed by the agreement for the change in the nature of the title was September 1, 1902. No one born after that date could be born a member of the tribe with the right to share in the tribal property, but such person might acquire by inheritance the right of ownership from a member who was living on September 1, 1902.

The Act of July 1, 1902, was primarily a partition agreement among the Cherokees, prepared for them and enacted into a statute by Congress, to serve, in a general way, as the ordinary partition procedure under State laws would do. The United States had no interest in the land, except that they had assumed the obligation and expense of allotting it.

The Cherokees were given the right to accept the plan of partition and distribution, if they wanted it; or to reject it, if they should see fit, as they had done the similar proposed agreement and statute of March 1, 1901 (31 St. 848), the year before.

The Act of 1902 was also an agreement between the United States and the Cherokee Tribe, as well as an agreement with the Cherokee National Government, as a body politic—whatever small modicum of Government there was at that time remaining.

The said Cherokee Agreement fixed September 1, 1902, as the date as of which the Cherokee property should be allotted and distributed and provided that no one born after that date should participate in the allotment and distribution.

October 31, 1902, was fixed as the last date on which applications for enrollment for allotment might be *received* by the Secretary of the Interior; but Cherokees claiming the right to enrollment had continued to file such applications up to December 1, 1905, as shown by the Act of April 26, 1906.

The Act of April 26, 1906, made provision for the enrollment of a part of these persons, all of whom had the qualifications required by the Act of July 1, 1902, and excluded certain others, who were minor children.

In order to provide for those so excluded by Section 2 of the Act of April 26, 1906, and to give the said class having all the qualifications required by the Act of July 1, 1902, additional time within which to file their applications for enrollment the amendment of June 21, 1906, was passed.

Appellants contend that this amendment did not contemplate the opening of the Cherokee rolls to admit any other persons than those excluded by the provisions contained in Section 2 of the Act of April 26, 1906, and included no persons who did not possess all the qualifications provided for by the Act of July 1, 1902, and say that the Secretary of the Interior had no authority in law to enroll any Cherokee child born after September 1, 1902, but that he

was expressly prohibited from so doing by the Act of July 1, 1902, and the Act of April 26, 1906, as amended; and that if the Act of April 26, 1906, as amended, should be so construed as to give the Secretary of the Interior such authority, then the said provision of law is unconstitutional and void.

Respectfully submitted,

WM. H. ROBESON,
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C. C. CALHOUN,
DANIEL B. HENDERSON,
Attorneys for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

LEVI B. GRITTS ET AL., APPELLANTS,
v.
WALTER L. FISHER, SECRETARY OF THE INTERIOR, and Franklin MacVeagh, Secretary of the Treasury. } No. 896.

APPEAL FROM THE COURT OF APPEALS, DISTRICT OF COLUMBIA.

STATEMENT, BRIEF, AND ARGUMENT FOR THE APPELLEES.

This is an appeal from the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District sustaining demurrers to and dismissing the amended bill of complaint.

The parties complainant

are Levi B. Gritts, Richard M. Wolfe, and Frank J. Boudinot, who are Cherokees by blood and assume to sue for themselves and on behalf of all Cherokees enrolled for allotment as of September 1, 1902, under the act of Congress approved July 1, 1902, 32 Stat. 716.

22550—12——1

The parties defendant

are Walter L. Fisher, Secretary of the Interior, and Franklin MacVeagh, Secretary of the Treasury.

The purpose of the suit

is to enjoin the Secretary of the Interior from allotting any lands of the Cherokee Nation to any Cherokee child born since September 1, 1902, and to enjoin the Secretaries of the Interior and the Treasury from paying any of the funds of the Cherokee Nation to any such child, and to require the Secretary of the Interior to sell all lands of the Cherokee Nation remaining to it after allotments have been made to all Cherokees living on September 1, 1902, and to distribute all funds of the Cherokee Nation, per capita, among the Cherokees, and their heirs, enrolled under the act of July 1, 1902.

The questions involved

are as to the construction and validity of the act of Congress of April 26, 1906, 34 Stat. 137, as amended by the act of June 21, 1906, 34 Stat. 325, 341.

The contention of complainants

is that these acts do not authorize the enrollment for allotment of Cherokee lands and funds of Cherokee children born since September 1, 1902, and that, if they do confer such authority, they are unconstitutional, as impairing the rights of complainants and all other Cherokees born prior to September 2, 1902, to such lands and funds, such rights having

become vested under and by virtue of the act of July 1, 1902.

The contention of defendants

is that these acts are constitutional and that they authorize the enrollment of Cherokee children born after September 1, 1902, and living on March 4, 1906, and admit such children to a share, with all other Cherokees, in the lands and funds of the Cherokee Nation.

The act of July 1, 1902, 32 Stat. 716,

upon which the complainants predicate their claim of vested rights, provided for enrollment, as follows:

> SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.
>
> SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.
>
> SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said

Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

As to allotment of land, the act provides:

SEC. 9. The lands belonging to the Cherokee tribe of Indians in Indian Territory,

except such as are herein reserved from allotment, shall be appraised at their true value: *Provided*, That in the determination of the value of such land consideration shall not be given to the location thereof, to any timber thereon, or to any mineral deposits contained therein, and shall be made without reference to improvements which may be located thereon.

SEC. 10. The appraisement, as herein provided, shall be made by the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior.

SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

SEC. 12. For the purpose of making allotments and designating homesteads hereunder, the forty acre, or quarter of a section, subdivision established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a section.

SEC. 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the

Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this Act: *Provided*, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of any one on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

SEC. 58. The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this Act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate.

SEC. 59. All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent.

As to the distribution of funds, the act provides:

SEC. 64. The collection of all revenues of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under rules and regulations to be prescribed by the said Secretary.

SEC. 65. All things necessary to carry into effect the provisions of this Act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior.

SEC. 66. All funds of the tribe, and all moneys accruing under the provisions of this Act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid

directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

SEC. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this Act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable and he shall make all needed rules and regulations to carry this provision into effect.

Briefly summed up, so far as pertinent to this case, this act as to enrollment is confined to persons living on the 1st day of September, 1902, and excludes children born thereafter from enrollment and from participation in the distribution of the tribal property of the nation.

As to allotment of land, it allots to each citizen enrolled land equal in value to 110 acres of the average allotable lands of the nation. It makes no disposition of tribal lands in excess of what is required for this allotment.

As to distribution of funds, it provides for the payment of tribal indebtedness then existing or thereafter incurred by authority of law up to the dissolution of the tribal government, and then payment to each individual of his per capita by the Secretary of the Interior under rules and regulations to be established. No distribution could be made until the tribal government was dissolved.

Persons not on the roll are not to participate in any manner in the distribution of the tribal property, "*and those whose names appear thereon shall participate in the manner set forth in this Act.*"

It is contended that by the provisions of the act there was made a definite and final determination of who were entitled to share in the lands and funds of the Cherokee Nation, definite and final beyond the power of Congress to change.

The bill of complaint alleges (R., 6):

> The number of persons on said roll entitled to such allotment, and to pro rata shares of all other property, is about 36,000; and the number of possible allotments of 110 acres of average lands was about 40,000, so that the surplus, after providing an allotment of 110 acres for each person so enrolled, amounted to about 4,000 allotments, equivalent to about 440,000 acres of said average lands. The reasonable value of the said surplus lands is not less than $4,400,000. The funds in the Treasury, together with such other sums as are to be added thereto, exclusive of any proceeds arising from the sale of said surplus lands, amount to about $2,500,000.

There remained, then, to the nation as such 440,000 acres of land, for the disposition of which the act made no provision. The funds of the nation were not in fact distributed and could not be until its just indebtedness was paid and the tribe dissolved, and there was not and has not been to this day a determination of the amount payable to any individual.

The tribal government

of the nation, it was provided by section 63 of the act, should "not continue longer than March fourth, nineteen hundred and six," but by Joint Resolution of March 2, 1906, 34 Stat. 822, it was "continued in full force and effect for all purposes under existing laws until all property * * * or the proceeds thereof, shall be distributed among the individual members."

And by section 28 of the act of April 26, 1906, 34 Stat. 137, this tribal government was continued "until otherwise provided by law."

The specific allotment of one hundred and ten acres of land to each member of the tribe enrolled under the act of July 1, 1902, has been made, and nobody proposes to disturb or interfere with that. The remaining lands and funds of the nation, however, are still held in tribal ownership.

The act of April 26, 1906, 34 Stat. 137,

in addition to continuing the tribal government, provided:

> SEC. 2. That for ninety days after approval hereof applications shall be received for enroll-

ment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of the land thus deficient. The provisions of section nine of the Creek agreement ratified by Act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and reenacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this Act as to allotments heretofore made, no contest shall be instituted against such allotment: *Provided,* That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further,* That nothing herein shall be construed so as to hereafter permit any person to file an

application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

There was an amendatory act of June 21, 1906, 34 Stat. 325, which provided (pp. 341, 342):

> That section two of the Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby, amended by striking out thereof the words "*Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States; *Provided further*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation whose cases are now pending in the Supreme Court of the United States." And insert in said Act in lieu of the matter repealed, the following: *Provided further*, That nothing herein shall be construed so as hereafter to permit any person to file an application for enrollment or to be entitled to enrollment in any of said tribes, except for minors the children of Indians by blood, or of freedmen members of said tribes, or of Mississippi Choctaws identified under the fourteenth

> article of the treaty of eighteen hundred and thirty, as herein otherwise provided, and the fact that the name of a person appears on the tribal roll of any said tribes shall not be construed to be an application for enrollment.

These two acts, or, properly speaking, the act of April 26, 1906, adds to the roll of the nation, and to the number of those enrolled to participate in the distribution of the tribal property, the children of enrolled persons born after September 1, 1902, and living on March 4, 1906.

The act of April 26, 1906, further provided (34 Stat. 143):

> SEC. 16. That when allotments as provided by this and other Acts of Congress have been made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes. In the disposition of the unallotted lands of the Choctaw and Chickasaw nations each Choctaw and Chickasaw freedman shall be entitled to a preference right, under such rules and regulations as the Secretary of the Interior may prescribe, to purchase at the appraised value enough land to equal with that already allotted to him forty acres in area. If any such purchaser fails to make payment within the time prescribed by said rules and regula-

tions, then such tract or parcel of land shall revert to the said Indian tribes and be sold as other surplus lands thereof. The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations, which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. Conveyances of lands sold under the provisions of this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances: *Provided further*, That agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person.

SEC. 17. That when the unallotted lands and other property belonging to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of Indians have been sold and the moneys arising from such sales or from any other source whatever have been paid into the United States Treasury to the credit of said tribes, respectively, and when all the just charges against the funds of the respective tribes have been deducted therefrom, any remaining funds shall be distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls of the respective tribes, such distribution to be made under rules and regulations to be prescribed by the Secretary of the Interior.

Here for the first time is provision made respecting lands remaining after all allotments have been made, and for the first time is there provision for a division and distribution of all the property of the nation.

The construction of the act of April 26, 1906,

is as contended by the defendants, for such is the necessary effect of its terms. It includes Cherokee children born after September 1, 1902, for it designates as persons entitled to enrollment "children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof." Not some such children, but all such children; not those "living on September 1, 1902, who were minors living March fourth, nineteen hundred and six," but simply those "who were minors living March fourth, nineteen hundred and six."

The history of the act leads irresistibly to the same conclusion.

In September, 1905, the Cherokee National Council passed an act which, on November 7, 1905, was approved by the President of the United States, which provided, among other things, for the appointment of a commission to represent the nation in the preparation of legislation for the final settlement of its affairs. On September 29, 1905, this commission was instructed by joint resolution of the council that it was the sense of the Cherokee people that—

> all children born since September first, nineteen hundred and two, and prior to March

> fourth, nineteen hundred and six, who but for the limitation contained in section twenty-five of the act of Congress of July first, nineteen hundred and two, would be entitled to share equally with children born prior thereto, and that said participation should, if possible, be equal in every respect in the lands and moneys as provided by said act of Congress. If this cannot be done, then a sum of money should be given to each of said children as will equal so far as possible the share which has been given others under said act.

The Interior Department interested itself with this commission, and the bill which became the act of April 26, 1906, was, as stated by Mr. Curtis, virtually a department bill. (Cong. Rec., vol. 40, pt. 2, p. 1242.)

Because of amendments, the bill went to conference. Amendment No. 4, made by the Senate, was to section 2 of the act, and it made a change of the date in the first part of the section from 1905 to 1906. The statement of the conferees on the part of the House attached to the conference report says:

> Amendment No. 4 requires the enrollment of children born up to March 4, 1906. (Report No. 2347, 59th Cong., 1st sess.)

The same Congress which passed the act authorized a suit in the Court of Claims to test its validity. This was done by amendment to the Indian appropriation bill of March 1, 1907, 34 Stat. 1015, 1028. In the conference report presenting this amendment to the House it is said:

> The effect of the amendment adopted is to permit a test case to be brought to determine the constitutionality of the act adding to the rolls of the Cherokee Nation children born since the act of 1902.

Indeed, these appellants, Boudinot and Gritts, asked for this legislation upon the ground that the act of 1906, because it enlarged the Cherokee enrollment, was unconstitutional, as an invasion of their rights. (Senate Doc. No. 234, 59th Cong., 2d sess.)

In the suits subsequently instituted in the Court of Claims by Brown and Gritts and Muskrat and Dick, all the parties, and the Court of Claims and this court, took for granted that the effect of the act of April 26, 1906, as amended by the act of June 21, 1906, was to enlarge the enrollment by the addition of "children who were minors living on March fourth, nineteen hundred and six," etc. *Muskrat* v. *United States*, 219 U. S. 346.

In this suit the plaintiffs say they are members of the Keetoowah Society, an organization made up of Cherokees by blood, and that this society has authorized them by resolution to bring this suit. The resolutions, which are set out as an exhibit to the amended bill of complaint, recite, among other things (R., 17, 18):

> Whereas, By acts of the Congress of the United States, approved on the 26th day of April, 1906, and June 21st, 1906, respectively, several millions of dollars worth of lands and moneys belonging to recognized citizens of the

Cherokee Nation, are directed to be taken from the proper owners thereof, without their consent, and distributed among about 5500 minor children, described in said acts of Congress, and

* * * * *

Now, therefore, Be it resolved by the Advisory Committee of Keetoowah Society that the President of Keetoowah Society be, and he is hereby, requested and directed to immediately take every necessary and proper step, and to do every proper and lawful thing, to prevent any person or persons whomsoever, and especially to prevent the minors enrolled under authority of said acts of Congress approved April 26th, 1906, and June 21st, 1906, respectively, from in any manner and at any time participating in the distribution of any of the property of the Cherokees, other than citizens of the Cherokee Nation entitled to so participate and who were living September 1st, 1902, and to this end he may take steps to join in the suit already instituted, or act independently, or do both, as he may think best, and most advisable; and the President of Keetoowah Society is hereby requested and directed to appoint two members of Incorporated Keetoowah Society to act with him and to assist and advise with him, and they three shall be known as the Executive Committee of Keetoowah Society. Said Executive Committee shall proceed at once to enter into a contract, in the name of the Incorporated Keetoowah Society, in their own individual names, in the names of all

members of Keetoowah Society, and for and in behalf of all duly enrolled and recognized citizens of the Cherokee Nation entitled to participate in the distribution of Cherokee lands and moneys, with some reputable attorney or attorneys to take all needful and legal steps before the courts, Committees of Congress, or Executive Departments of the Government of the United States to prevent said minor children from receiving lands and moneys, or either, as proposed in said laws of Congress, and to bring suit, if necessary, against the Government of the United States to recover the full value of all lands or moneys wrongfully, or unconstitutionally, given to said minor children by its officers, whether said officers claim to act by authority of Congress or not.

The departments, Interior and Treasury both, from the beginning construed the act as authorizing the enrollment of children born after September 1, 1902, and so, indeed, did everybody concerned with the act in any way—the Congress which enacted it and which authorized the suits to test its validity, the departments which had to administer it, the parties litigant under it, and the courts which had to deal with it. Indeed, if the act did not provide for the enrollment of these after-born children it was entirely without purpose and effect.

Constitutionality of the act.

It is not proposed to disturb the allotment of land which has been made under the act of July 1, 1902.

There remains, however, unallotted an amount of land stated by the bill to be 440,000 acres. There has been no distribution of the funds in the Treasury and no determination as yet of the amount available for distribution, as all indebtedness of the tribe must first be paid, and in no event could distribution be made until the tribe was dissolved.

The title to the surplus lands and the funds

is in the Cherokee Nation and not in the individual members of the tribe.

> *Stephens* v. *Cherokee Nation*, 174 U. S. 445;
> *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294;
> *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127.

The question of enrollment in the citizenship

of the nation, which is here determinative of the right to share in its property when distributed, is one over which Congress has complete control.

Congress has heretofore, without question, from time to time changed the date for completion of enrollment.

By the act of March 3, 1893, 27 Stat. 612, 645, the Commission to the Five Civilized Tribes was appointed to determine the citizenship.

By the act of June 28, 1898, 30 Stat. 495, 502, 503, the Commission was directed to prepare a complete roll which, when approved by the Secretary of the Interior, should "alone constitute the several tribes which they represent."

By the act of May 31, 1900, 31 Stat. 221, 236, the Commission was instructed not to

> receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in the Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such.

By the act of March 3, 1901, 31 Stat. 1058, 1077, it was provided that the rolls as approved by the Secretary of the Interior should be final, and the Secretary was authorized to fix a date for closing the roll. Acting under this authority he fixed July 1, 1902, as the date for closing the roll, and the rolls remained closed until after the ratification of the act of July 1, 1902, by the Cherokee people on August 7, 1902, which was promulgated August 12, 1902.

Section 25 of the act of July 1, 1902, 32 Stat. 716, 720, extended the date for closing the roll to September 1, 1902.

Section 2 of the act of April 26, 1906, as amended by the act of June 21, 1906, again extended the date as of which the Cherokee rolls should be made from September 1, 1902, to March 4, 1906, by authorizing the enrollment of minor children born to enrolled Cherokee parents between September 1, 1902, and March 4, 1906.

Every extension of the time for enrollment admitted newly born children to citizenship and to participation in the lands and funds of the tribe when allotment and distribution were made. When

does the power of Congress over the matter cease? There can be but one answer to the question, and that is, that the power of Congress ceases with the dissolution of tribal relations and the vesting of the tribal property in the individual members of the dissolved tribe.

By section 26 of the act of July 1, 1902, Congress provided:

> The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled * * * shall be placed upon the roll * * * and no child born thereafter * * * and no white person who has intermarried * * * shall be entitled to enrollment or to participate in the distribution of the tribal property.

Congress had the right to fix any other future date as well as that of September 1, 1902. It might, then, by the act of 1902 have fixed the date of March 4, 1906. This being a proper subject of legislative action, Congress had the same power to amend the law that it had to enact it originally. That property expectations would be affected by its action did not impair its power.

In *Stephens* v. *Cherokee Nation*, 174 U. S. 445, l. c. 488, this court said:

> We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we cannot say that Congress could not empower the Dawes Commission to determine, in the man-

> ner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes. It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of these acts in respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.

And in *Wallace* v. *Adams*, 204 U. S. 415, l. c. 423, the court said:

> * * * The power of Congress over the matter of citizenship in these Indian tribes was plenary, and it could adopt any reasonable means to ascertain who were entitled to its privileges. *If the result of one measure was not satisfactory it could try another.*

This case was in error to the Court of Appeals for the Eighth Circuit, where the opinion was rendered

by Judge Sanborn. 143 Fed. Rep. 716. This court refers "to the exhaustive opinion of Circuit Judge Sanborn * * * with which, in the main, we fully concur." Judge Sanborn said (l. c. p. 722):

> * * * But none of the authorities cited contain a decision that one has a vested right in a judgment of citizenship which the legislative department of the United States may not lawfully disturb, although one of the ultimate consequences of such a judgment, if undisturbed, might be an interest in land and other property.
>
> * * * as the determination of this question of citizenship was a purely legislative and administrative function, and not a judicial one, Congress necessarily had the authority under the Constitution at any time before the allotment of land under its previous acts had been finally made to the defendant, and his right to the land had thereby become vested, to repeal its previous legislation, to change its method of determining the issue, to strike down any decision that had been made under its previous acts, to prescribe a new method of deciding the question, or to refuse to determine it altogether and leave the claim of the defendant as it found it, conclusively barred by its rejection by the Choctaw Nation. A striking and persuasive analogy to the power of the legislative department of the government to determine this question of citizenship and to dispose of the lands of the tribes is found in its jurisdiction to dispose of the public lands of the United States. * * * Nothing short

> of entry and payment confer upon a settler vested rights against the United States which impair in any respect the plenary power of its legislative department to dispose of the land to another or to withdraw it from sale for the use of the government. * * * The Act July 1, 1902, c. 1362, 32 Stat. 641, which created the citizenship court and authorized it to review the judgment of the United States court in the Indian Territory of March 8, 1898, in favor of the defendant, was of the same nature. It was but a modification or an amendment of, or an addition to, the method prescribed by the legislative department of the government for the determination of the question whether or not Hill was a citizen of the Choctaw Nation by its acts of June 10, 1896 (29 Stat. 340, c. 398), and July 1, 1898 (30 Stat. 591, c. 545). When it was passed, the Dawes Commission, to whom Congress had delegated the power to distribute the lands of the tribes, had not allotted the land in dispute to the defendant. He had, therefore, acquired no vested right in it as against subsequent legislation of the United States because, until such an allotment was made, all the proceedings determinative of citizenship and of distribution which derived their force and effect from the legislative power of the United States alone were necessarily subject to the further exercise of that authority.

That the Cherokee Nation assented to the act of July 1, 1902, and that it is in the nature of an agreement, does not alter the case. Acts of Congress deal-

ing with Indian tribes and treaties with those tribes stand upon the same footing.

In *Conley* v. *Ballinger*, 216 U. S. 84, a treaty was involved, and the court said that the United States "was bound itself only by honor, and not by law," and that the terms of the treaty "were addressed only to the tribe and rested for their fulfillment on the good faith of the United States—*a good faith that would not be broken by a change believed by Congress to be for the welfare of the Indians*" (p. 91).

This necessarily implies plenary power on the part of Congress over all tribal relations and tribal property. Being bound by honor and not by law, Congress must answer to the dictates of honor, and can not be hampered by the terms of the law. And as its faith is not broken by a change believed to be for the welfare of the Indians, it must, to keep that faith, make a change when it believes a change is required by that welfare.

Nothing, therefore, became vested in the individual members of the tribe except as allotment or distribution was actually made to them. As to surplus lands and funds not distributed, and not available for distribution, still resting in tribal ownership, the power to make a change, and the duty to make it, if the welfare of the Indians required it, remained in Congress.

The cases cited were fully approved in *Marchie Tiger* v. *Western Investment Company*, 221 U. S. 286, and a forward step taken by Congress was sustained. The legislation there involved affected in-

dividual members of the tribe, who had been admitted to citizenship in the United States, in respect to lands held by them in individual right. The court said (p. 316):

> Upon the matters involved our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees as shown in this case; that in the present case when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian.

The question involved has been decided adversely to plaintiffs by the Supreme Court of the District. The opinion of Mr. Justice Stafford will be found in the record, pages 22–29. The case was affirmed by the Court of Appeals and is reported in 39 Wash. Law Reporter 754. The question was passed upon also, and to like effect, by the Court of Claims in *Muskrat* v. *United States*, 44 C. Cls. R. 137.

Elaboration of argument seems unnecessary. A single question is presented: Did Congress exhaust its powers over the tribal relations and tribal property of the Cherokees by the act of July 1, 1902? Certainly it could have repealed that act that day and indeed at any time before it was put into execution. And as to property not distributed by the act, but left in tribal possession, its power remained to be exercised in such manner as it believed to be right. The act of 1906 takes nothing from any individual member which he has received, and only provides for allotment of land and distribution of funds which yet remain with the nation.

It is respectfully submitted that the decree of the District Court of Appeals should be affirmed.

F. W. LEHMANN,
Solicitor General.

JANUARY, 1912.

O

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 896.

LEVI B. GRITTS, ET AL., *Appellants,*

vs.

WALTER L. FISHER, *Secretary of the Interior,* ET AL. *Appellees.*

APPEAL FROM THE COURT OF APPEALS, DISTRICT OF COLUMBIA.

REPLY BRIEF OF APPELLANTS.

REPLY BRIEF.

We show in this brief that:

1. There was an affirmative grant to the appellants of all the lands and all the funds of the Cherokee Tribe.

2. The acts of 1906 are not inconsistent with the act of July 1, 1902, and do not authorize the addition of the

name of any person born since September 1, 1902, to the Cherokee Allotment Roll.

3. The large surplus now in controversy was not apparent at the time the legislation embodied in the act of April 26, 1906 (34 St., 137), was under consideration in Congress, but became a reality by reason of the final outcome of the intermarriage cases.

At the time Congress had this legislation under discussion it had before it an apparent deficiency of 1,279 allotments in the Cherokee Nation.

4. The appellees have quoted, at page 16 of their brief, a report of a Congressional Committee, which was not only withdrawn before the legislation was completed, but which was entirely reversed in the particulars referred to by a substituted report.

5. The amendment of June 21, 1906, relied on by appellees, was enacted by Congress, with the understanding, as stated at the time, that it did not violate the conditions and limitations concerning enrollment for allotment provided by the act of July 1, 1902, but confirmed them.

The questions involved in the case and the contentions of complainants and defendants, respectively, are accurately stated on pages 2 and 3 of appellees' brief; but the errors in their brief extend throughout its whole scope thereafter; and, in order to discuss them intelligently, the statutes relied on herein must be carefully considered.

Counsel protest that this case stands on demurrer, and many statements of fact on behalf of defendants have found their way into the case which are entirely improper, and which counsel would pass unnoticed, if they did not deem it their duty to inform the Court that such statements, to which much importance is attached, ought not

to appear. And if appellants were permitted to show all the facts bearing upon the points involved, the conclusions reached would be altogether different from those drawn therefrom in the briefs filed.

As an instance, attention is invited to the statement on page 15 of the Government's brief, that:

> "On September 29, 1905, this Commission was instructed by joint resolution of the Council that it was the sense of the Cherokee people that 'all children born since September 1, 1902, and prior to March 4, 1906, who but for the limitation contained in Section 25 of the act of Congress of July 1, 1902, would be entitled to share equally with children born prior thereto, etc.' "

This joint resolution to have any validity must first have been approved by the President of the United States.

This approval was not obtained until August, 1907, long after the Commission had returned from Washington, and the legislation had been enacted, and then not for the purpose of giving validity to the acts of the committee, but, at the instance of Government counsel, to aid in defense of the suit then pending in the Court of Claims, involving a controversy over this same property.

Counsel feel compelled by sense of duty to suggest to the Court that if the case were not here on demurrer, and opportunity had been given to take testimony on this question, it would be conclusively shown that it was not the will of the Cherokee people, in 1905, or at any other date, that children born after September 1, 1902, be enrolled for allotment in the Cherokee Tribe.

CONSTRUCTION OF THE STATUTES.

In seeking the proper construction to be given to the statutes involved, we first inquire, **What did Congress accomplish** by the several acts of July 1, 1902 (32 Stat., 716), April 26, 1906 (34 Stat., 137), and June 21, 1906 (34 Stat., 325).

And consideration of this question will render it necessary at times to go back of the dates of approval of these respective acts, wherever the meaning of the language is doubtful, to ascertain, **What was the intention of Congress** in the premises.

By way of preface, the titles to the several acts should be observed, as they are instructive.

The Act of July 1, 1902, is:

> "An Act to Provide for the Allotment of the Lands of the Cherokee Nation, for the disposition of Townsites therein, and for other purposes."

The Act of April 26, 1906, is:

> "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes."

The Act of June 21, 1906, is:

> "An Act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with the various Indian Tribes, and for other purposes, for the fiscal year ending June 30, 1907."

No correct conclusion as to the meaning of these statutes, and their relations to one another, and the interpreta-

tion thereof required for a decision of the questions involved in this case, can be hoped for, unless in discussing the terms of the various sections of the respective acts a clear distinction is constantly kept in mind as to the difference between

(a) filing applications for enrollment;

(b) receiving applications for enrollment;

(c) passing upon, i. e., approving or rejecting the same; and

(d) making allotments to those whose applications are approved.

The filing of application was not an official act, but one performed for the applicant, by himself or his agent; the receiving of the application was an official act, of a ministerial character, performed by the Secretary; the approval or rejection of the application was an official act, of a judicial character, likewise performed by the Secretary; the allotment was an official act of the Secretary of a ministerial character.

Let us see, then, **what these several Acts of Congress accomplished.**

THE ACT OF JULY 1, 1902.

1. Confers exclusive jurisdiction upon the Secretary of the Interior "to determine all matters relative to the appraisement and the allotment of lands."

Sec. 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands.

2. Directs the Secretary of the Interior to make a roll of the citizens of the Cherokee Nation, entitled to allotment.

Sec. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

3. Provides for allotment of land equal to 110 acres of the average allottable land to "each citizen of the Cherokee Tribe, to be made as soon as practicable after approval by the Secretary of the Interior of his enrollment."

Sec. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee Tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

4. Authorizes the selection of allotments in tracts as small as ten acres each.

Sec. 12. For the purpose of making allotments and designating homesteads hereunder, the forty-acre, or quarter of a quarter section, subdivision established by the Government survey, may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

Sec. 17. In the making of allotments and in the designation of homesteads for members of said tribe, said Commission shall not be required to divide lands into tracts of less than the smallest legal subdivision provided for in section twelve hereof.

5. Provides that the "roll of citizens of the Cherokee Nation shall be made as of September 1, 1902."

Sec. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

6. Provides that no child born after September 1, 1902, "shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation."

Sec. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

7. Provides that the "roll shall in all other respects be made in strict compliance with the provisions of Section 21 of the act of June 28, 1898 (30 St., 495), and the act of May 31, 1900 (31 St., 221.)"

Sec. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the Act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

8. Provides that the roll shall be deemed complete when lists embracing the names of all those lawfully entitled to enrollment have been submitted to and approved by the Secretary, and upon this roll allotment of (all the) land and distribution of (all the) other tribal property shall be made.

Sec. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

9. Provides that if any person enrolled as provided by the act die after September 1, 1902, and before receiving his allotment, "the lands to which such person would have been entitled, if living, shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs" according to the law of descent and distribution of Mansfield's Digest.

Sec. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided,* That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

10. Provides that no person whose name does not appear upon the roll prepared as provided by the act "shall be entitled to in any manner participate in the distribution of the common property of the Cherokee Tribe," and those whose names appear therein shall participate in the manner set forth in this act.

Sec. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in

any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this Act: *Provided,* That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of anyone on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

That is, they or their heirs, shall receive their allotment of land, 110 acres, and their proportionate shares of other tribal property, as provided in sections 20 and 29, *supra.*

11. Provides that "no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll, and who died prior to the first day of September, 1902."

See Sec. 31, *supra.*

12. Directs the Secretary to select an allotment for any member of the tribe who, for any reason, failed to select for himself.

Sec. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation.

13. Authorizes the Secretary to receive applications for the enrollment of minor children up to October 31, 1902, but declares that "the application of no person whomsoever for enrollment shall be received after the 31st day of October, 1902."

Sec. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

14. Directs the Secretary of the Interior to provide the principal chief with blank patents for conveyances of the allotments and to approve all such conveyances.

Sec. 58. The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all con-

veyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this Act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate.

Sec. 59. All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent.

15. Directs the Secretary to collect grazing taxes for the benefit of the tribe.

Sec. 72. * * * When cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens, the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe.

16. Directs the Secretary to collect all revenues of the tribe and to pay out of the funds of the tribe all its just indebtedness at the earliest possible time, and to make pro rata distribution of the residue to the members.

Sec. 64. The collection of all revenues of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under rules and regulations to be prescribed by the said Secretary.

Sec. 66. All funds of the tribe, and all moneys accruing under the provisions of this Act, shall be paid out under

the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

Sec. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this Act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable and he shall make all needed rules and regulations to carry this provision into effect.

17. Finally, the Secretary is given authority to do all things necessary to carry into effect the provisions of the act, not otherwise therein specifically provided for.

Sec. 65. All things necessary to carry into effect the provisions of this Act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior.

The act became an agreement between the United States and the Cherokee Nation, and an agreement among the Cherokees, effective as of September 1, 1902, and it provides that "no act of Congress or treaty provision inconsistent with this agreement shall be in force in said Nation, except Sections 14 and 27 of said last-mentioned act (June 28, 1898)."

Sec. 73. The provisions of section thirteen of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled, "An Act for the protection of the people of the Indian Territory, and for other purposes," shall not apply to or in any manner affect the lands or other property of said tribe, and no Act of Congress or treaty provision inconsistent with this agreement shall be in force in said Nation except sections fourteen and twenty-seven of said last-mentioned Act, which shall continue in force as if this agreement had not been made.

Sec. 74. This Act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following:

The effect of the Act of July 1, 1902.

Thus it will be seen that the act of July 1, 1902, being a partition agreement among the Cherokees, as well as an act of Congress, providing for the partition and distribution of all the common property of the Cherokees, declares specifically to what persons, or what class of persons, the property shall be allotted or distributed, and fixes the method and means of ascertaining and enrolling the members thereof, including the provision that no person born after September 1, 1902, shall participate in any manner in the said property, and that all persons living on said date and possessing the qualifications required by the act, or their respective heirs, shall alone participate in the allotment of land and distribution of other tribal property, gives the Secretary of the Interior express authority to collect the revenues and to pay the debts, and directs him to make per capita distribution and to settle the affairs of the tribe at the earliest practicable date.

He is prohibited from allotting lands or distributing other

tribal property to anyone born after September 1, 1902, and from even receiving applications for enrollment of anyone after October 31, 1902.

This latter provision, as we shall see later, was amended by the act of April 26, 1906, because, as it turned out, there were some persons entitled to enrollment under the act of July 1, 1902, whose applications were not filed by October 31, 1902.

THE INTENTION OF CONGRESS.

So plain is the language of the act of July 1, 1902, that there is little occasion to discuss the intention of Congress in the enactment.

And on no one point in the act is the intention so clear, distinct and pronounced as that of changing the *communal* character of *all* the property *on September 1, 1902.* Language could not well have done more. It indicates an anxiety on the part of Congress lest the Cherokee people themselves might be tempted to violate the compact in this respect, but gives no warning whatever of the danger to the Cherokees that Congress might at will disregard its most essential provisions, and ignore entirely *the tribal law embodied therein.*

Defendants contend that Congress did not intend by this act to individualize the surplus lands and undistributed funds. We submit that the language used shows conclusively otherwise; and we further say that Sections 16 and 17 of the act of April 26, 1906 (34 Stat., 137), show that Congress on that date knew that the act of July 1, 1902, made no different disposition of the *ownership* of the surplus property from that made of the allotments of land thereunder.

DIFFERENCES OF CONTENTION.

Practically the only difference between the contention of plaintiffs and that of the defendants, as to the intention of Congress and the effect of the act of July 1, 1902, is that the defendants, as shown on page 10 of their brief, urge that the surplus lands remained

> "to the nation," and that for the disposition thereof "the act made no provision,"

and they say further, on the same page of their brief:

> "The funds of the nation were not in fact distributed, and could not be until its just indebtedness was paid and the tribe dissolved."

And, further:

> "The specific allotment of 110 acres of land to each member of the tribe enrolled under act of July 1, 1902, has been made, and nobody proposes to disturb or interfere with that. The remaining lands and funds of the nation, however, are still held in tribal ownership."

Appellants' construction of this act, as shown above, is that its terms apply equally to all the Cherokee property, the surplus lands and the undistributed funds in the treasury, as well as the allotments of 110 acres to each allottee.

Conceding for the sake of argument that the act of July 1, 1902,

> "makes no disposition of tribal lands in excess of what is required for this allotment,"

as contended by defendants on page 8 of their brief, then we cite the provisions of Sections 16 and 17 of the act of April 26, 1906, *infra*.

Further, if it be true that

> the remaining lands and funds of the Nation, however, **are still held in tribal ownership,"**

then, under the allegations in plaintiffs' bill, the demurrers should have been overruled and the injunction sustained, for *tribal* property must be distributed equally among all the members of the tribe as of the date on which the distribution is to be made; and it is charged in plaintiffs' bill that the defendant, the Secretary of the Interior, is proceeding to give this property to 5,610 persons, living as of March 4, 1906, to the exclusion of all other members of the tribe.

Nowhere in any of the three acts under consideration is any other date than September 1, 1902, fixed as of which an allotment and distribution must be made to all the members of the Cherokee tribe, and the act of April 26, 1906, contains no provision for allotment and distribution to be made as of March 4, 1906.

THE ACT OF APRIL 26, 1906.

Unlike the act of July 1, 1902 (32 Stat., 716), which is an allotment act, a *special* act relating to the Cherokees alone, the act of April 26, 1906 (34 Stat., 137), is a *general* act, providing for the "final disposition of the affairs of the Five Civilized Tribes," an act to complete and close the allotment, to hasten the distribution of the property among those entitled to enrollment.

The portions of this act requiring consideration are Sections 1, 2, 16 and 17.

Section 1 provides:

1. That after the approval of the act no person shall be enrolled as a citizen of the Cherokee Tribe (except as otherwise provided in the act) unless his application for enrollment was made prior to December 1, 1905, and was not allowed by the Secretary solely because not made within the time prescribed by law.

2. That the Secretary may enroll such person, if his name appear upon a tribal roll and the record show that his application was made before said date, and was not allowed solely for the reason that it was not made within the time prescribed by law.

> "That after the approval of this Act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this Act, in which cases such motion shall be made within sixty days after the passage of this Act: *Provided*, That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commissioner to the Five Civilized

Tribes show application was made prior to December first, nineteen hundred and five, and which was not allowed solely because not made within the time prescribed by law."

Section 2 provides:

1. That for 90 days after approval of the act applications shall be received for the enrollment of certain minor children of the Choctaw, Chickasaw, Cherokee or Creek tribes; *Provided*, that nothing therein contained

> "Shall be so construed as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing applications has been fixed by agreement between said tribe and the United States."
>
> (The Act of July 1, 1902, was such an agreement with the Cherokees.)

2. Allotments shall be made to children so enrolled.

Note.—Every such child must, however, have been living September 1, 1902.

3. If any citizen of the Cherokee Tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of the land thus deficient.

(This was to provide for an apparent deficiency of land, of which Congress had notice, *infra.*)

"Sec. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have

applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and re-enacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this act as to allotments heretofore made, no contest shall be instituted against such allotment: *Provided,* That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further,* That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided,* That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States."

Sections 16 and 17 provide:

1. That when allotments have been made to all members of the tribe (entitled thereto) the residue of lands not re-

served or otherwise disposed of shall be sold by the Secretary, and the proceeds deposited in the Treasury to the credit of the Tribe.

2. And that after all just charges have been deducted from the funds,

> "Any remaining funds shall be distributed per capita to the members then living, and the heirs of deceased members whose names appear upon the finally approved rolls of the tribe."

Note.—There were already more than 36,000 Cherokees enrolled on the approved rolls when this act was passed, as shown *infra.*)

"Sec. 16. That when allotments as provided by this and other Acts of Congress have been made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes. In the disposition of the unallotted lands of the Choctaw and Chickasaw nations each Choctaw and Chickasaw freedman shall be entitled to a preference right, under such rules and regulations as the Secretary of the Interior may prescribe, to purchase at the appraised value enough land to equal with that already allotted to him forty acres in area. If any such purchaser fails to make payment within the time prescribed by said rules and regulations, then such tract or parcel of land shall revert to the said Indian tribes and be sold as other surplus lands thereof. The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desira-

ble, any of the unallotted land in the Choctaw and Chickasaw nations, which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. Conveyances of lands sold under the provisions of this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances: *Provided further,* That agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person.

Sec. 17. That when the unallotted lands and other property belonging to the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes of Indians have been sold and the moneys arising from such sales or from any other source whatever have been paid into the United States Treasury to the credit of said tribes, respectively, and when all the just charges against the funds of the respective tribes have been deducted therefrom, any remaining funds shall be distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls of the respective tribes, such distribution to be made under rules and regulations to be prescribed by the Secretary of the Interior."

The effect of Section 1 is:

(a) To amend Section 30 of the act of July 1, 1902, so as to permit the Secretary to enroll certain persons who had filed applications under the latter act, but after October 31, 1902. (These persons must have been living September 1, 1902.)

(b) To prohibit the enrollment of all other persons as members of the Cherokee Tribe after the date of the approval of the act, except as otherwise provided therein.

The effect of Section 2 is:

(a) To forbid the filing of an application for enrollment of any person as a member of the Cherokee Tribe after April 26, 1906.

(b) To authorize the Secretary to receive applications of certain Cherokee minors, for 90 days after the approval of the Act, if any such had filed applications prior to April 26, 1906.

Note.—Such applications, of course, must have been filed under the provisions of the Act of July 1, 1902, which act contained no prohibition against such filings, even after October 31, 1902.

(c) To direct the Secretary to make allotment to any child described in the act whom he finds possessed of the qualifications for enrollment required by the Act of July 1, 1902.

Note.—Section 2 nowhere designates what minors are entitled to enrollment or allotment. That can be ascertained only by reference to the Act of July 1, 1902.

(d) To provide a money payment in lieu of land to any citizen of the Cherokee Tribe who might fail to receive the full quantity of land to which he was entitled as an allotment.

Note.—To ascertain what qualifications entitled a Cherokee to allotment reference must be made to the Act of July 1, 1902. The most definite and positive requirement thereof is that the Cherokee must have been living September 1, 1902. Hence the provision for money in lieu of allotment could not pertain to Cherokee children born after September 1, 1902.

The effect of Sections 16 and 17 is:

(a) Not to repeal any part of the Act of July 1, 1902, but to confirm those provisions of the Allotment Act, mak-

ing the persons enrolled thereunder the sole distributees of the funds of the tribe.

(b) To instruct the Secretary specifically to sell the surplus lands, collect the proceeds and deposit the same in the Treasury of the United States to the credit of the Tribe.

THE ACT OF JUNE 21, 1906.
(34 Stat., 325.)

This is the general Indian Appropriation Act for the year ending June 30, 1907, and contains the amendment to the Act of April 26, 1906, with which we are concerned.

It strikes out the second proviso in Section 2 of the Act of April 26, 1906 (34 Stat., 137), and substitutes therefor the following:

> "Provided, further, that nothing herein shall be construed so as hereafter to permit any person to file an application for enrollment or to be entitled to enrollment in any of said tribes except for minors, the children of Indians by blood, or of freedmen members of said tribes or of Mississippi Choctaws identified under the 14th article of the treaty of 1830, as herein otherwise provided, and the fact that the name of a person appears on the tribal roll of any of said tribes shall not be construed to be an application for enrollment."
> (34 Stat., at p. 341.)

In the original act proviso 2 contained nothing more than the legislative construction which Congress gave the Secretary of the Interior as to the meaning of the first part of that section; namely, that it *must not be so construed* as to permit any Cherokee minor to *file an application* for enrollment after April 26, 1906, showing that it related solely to applications, not to enrollment.

Proviso 2 had not changed the meaning of Section 2, but had only instructed the Secretary of the Interior how to construe it.

The effect of the amendment of June 21, 1906, is:

(a) To remove the prohibition as to the filing of applications by certain Cherokee minors within the 90 days fixed by Section 2.

(b) To exclude all applications of minors who were not Indians by blood.

(c) To provide that the fact of a person's name appearing on a tribal roll should not be construed to be an application for enrollment.

Note.—The amendment conferred upon the Secretary no authority to enroll Cherokees that he had not theretofore possessed; it furnished no new or different qualifications entitling an applicant to enrollment in the tribe, and it opened the roll to no person born after September 1, 1902.

INTENTION OF CONGRESS.

It is obviously absurd to insist that Congress intended to add five thousand and more new names to the Cherokee allotment rolls, of a class expressly excluded therefrom by the Act of July 1, 1902, when it is known that there were already more persons claiming and applying for allotments under the said Act of July 1, 1902 (32 Stat., 716), than the whole Cherokee domain would supply. There was an apparent possible deficiency of land in the Cherokee Nation amounting to the equivalent of 1279 full allotments known to and considered by Congress along with the bill which became the Act of April 26, 1906 (34 Stat., 137).

In the House of Representatives, January 18, 1906, the bill (H. R. No. 5976, 59th Congress, 1st Session, which

afterwards became the Act of April 26, 1906) was explained by Mr. Curtis, who had charge of the measure. He said:

> "In the Cherokee Nation 36,000 of all classes have been enrolled, and there are 1674 to be acted upon, and 2730 intermarried whites, of whom 1587 have a case pending in the Supreme Court of the United States. On the Cherokee rolls there are 32,781 by blood, 4094 freedmen, and 1143 intermarried whites." (Cong. Rec., Vol. 40, p. 1241.)

That is to say, Mr. Curtis informed Congress that—

32,781 Cherokees by blood were already enrolled; that
4,094 freedmen were already enrolled; that
1,143 intermarried whites were already enrolled; that
1,587 intermarried whites had applications for enrollment depending on the decision of this court not yet rendered in the Cherokee Intermarriage cases; and that
1,674 Cherokees by blood and freedmen had applications pending for enrollment but not yet acted upon by the Secretary.

That a total of 41,279 of all classes were applying for Cherokee allotments at the time.

It was also known officially that the whole area of the Cherokee domain comprised only about 4,400,000 acres (Annual Reports Interior Department, 1901, page 656; also, 203 U. S., page 76), sufficient to provide 40,000 allotments of 110 acres each as provided for by said Act of July 1, 1902. Thus, with only 40,000 allotments possible

to be made out of the whole Cherokee domain, if every acre were taken, and with 41,279 persons applying for allotments, is it not absurd to contend that Congress, with the facts before it at the time, deliberately intended to add another five thousand new allottees to the rolls? That Congress was fully awake to the situation is shown by the clause inserted in Section 2 of the Act of April 26, 1906 (34 Stat., 137), the following provision:

> "If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient."

to provide for the possible apparent deficiency already existing in Cherokee land.

The large surplus now existing, and which these appellants are endeavoring to save to the rightful owners, as they believe them to be, became apparent only after the decision of this court in the Cherokee Intermarriage Cases (203 U. S., p. 76), which was decided November 5, 1906, long after the approval of the acts relied upon by Appellees.

AMENDMENT 4.

The quotation from H. R. report No. 2347, 59th Congress, 1st Session (page 16 of appellee's brief), is not authoritative, but the reverse.

Speaking of the bill (H. R. 5976, 59th Cong. 1st Sess.) which became the Act of April 26, 1906 (34 Stat., 137), the Solicitor-General says, quoting:

> "Amendment No. 4 requires the enrollment of children born up to March 4, 1906." (Report No. 2347, 59th Cong., 1st Sess.)

The Solicitor-General perhaps did not know, at the time he quoted from this report, that said report, printed March 16, 1906, was objected to in the Senate on March 28, 1906, for the very reason that the Conference Committee had eliminated from Section 2 of the bill the second proviso thereof:

> "Provided, further, that nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe, where the date for filing application has been fixed by agreement between said tribe and the United States." (Cong. Rec., Vol. 40, pages 4384 to 4397.)

The said report was, on April 10, 1906, formally withdrawn and a new one submitted and adopted with said proviso restored (Cong. Rec., Vol. 40, page 4991).

The Act of April 26, 1906 (34 Stat., 137), nowhere provides that enrollment shall be made, except in the proviso in the first section, which was limited, strictly, to those whose names appear upon the tribal rolls, and for whom the official records show, "application was made prior to December 1, 1905, and which was not allowed solely because not made within the time prescribed by law"; namely, for the Cherokees, October 31, 1902.

Section 2 provides for the receiving of applications for ninety days after the passage of the act.

To emphasize the meaning of this section, and to show that it applied only to *receiving*, and not to *filing*, applications the proviso was incorporated.

After receiving the application, the Secretary, failing to find any authority for, or the qualifications required for, enrollment of those whose applications he was authorized to

receive, must look to the Act of July 1, 1902, for this authority and these qualifications.

One of these requirements, among many others, he finds to be that the applicant must have been living Sept. 1, 1902, and he finds that there is actually such a class, meeting all these requirements, whose applications have been filed, but for the lack of authority had not been received at the time of the passage of the Act.

Many minors of this class, living September 1, 1902, and also March 4, 1906, for whose enrollment application had not been filed prior to November 1, 1902, have had their applications received under the Act of April 26, 1906, and have been enrolled (see page 32a, appellants' original brief).

It will be observed that the words in the amendment of June 21, "to be entitled to enrollment," and "as herein otherwise provided" and "and the fact that the name of a person appears on the tribal roll of any of said tribes shall not be construed to be an application for enrollment," are all new to Section 2 of the Act of April 26, 1906.

The first "or to be entitled to enrollment," which are added immediately following the words, "to file applications for enrollment," show clearly that Congress contemplated that Section 2 had provided for two classes of persons, namely, those who might "file applications for enrollment," and those who were "entitled to enrollment"; and that the mere fact of filing applications for enrollment, as provided for in Section 2, did not necessarily entitle "to enrollment."

The second, "as herein otherwise provided," limits the provisions of the amendment strictly to that class of minors, freedmen and Choctaws, provided for in the act; which shows clearly that the purpose of the amendment was *exclusive* rather than *inclusive*.

And the last, "and the fact that the name of a person appears on the tribal roll of any of said tribes shall not be construed to be an application for enrollment," is a clear legislative construction of both the amendment and the act amended as to the judicial discretion contemplated thereby on the part of the secretary, and as the last utterance of Congress on the subject.

It should be borne in mind that this amendment of June 21, 1906, appears in the Indian Appropriation Act for the year 1907 (34 Stat., 325, at pages 341-2). It should be read together with Section 1 of the act amended and in the light of the construction already placed by Congress on the meaning of Section 2, *i. e.*, relating solely to receiving applications and not to enrollment. The act was originally H. R. Bill, No. 15,331, 59th Congress, 1st Session, and because of Amendments, the bill had to go to conference.

Amendment No. 56, made by the Senate and further by the Conference Committee, was the amendment referred to, and found at page 6, H. R. Report No. 4436, 59th Congress, 1st Session.

The statement of the conferees on the part of the House says:

> "Amendment No. 56 repeals so much of the Curtis Act" (Act of April 26, 1906) "as provided that nothing therein should be construed so as to limit the term of filing an application for enrollment when the time limit therefor has been fixed by agreement."
>
> (Page 16, H. R. Report No. 4436, 59th Cong., 1st Sess.)

Which is altogether different from repealing the express provisions of the original act as to the qualification required for enrollment.

With this before it the House proceeded to, and did, pass the bill.

For the purposes of this case, therefore, the amendment of June 21, 1906, as to Section 1 provides that the fact that the name of a person appears on a tribal roll shall not be construed to be an application for enrollment, and as to Section 2 provides that it shall not be construed so as to hereafter permit any person to file an application for enrollment, or to be entitled to enrollment, except for minor children of Indians by blood; and, further, it repeals proviso 2 in Section 2, which proviso, as shown above, excluded from the right to file applications for enrollment after April 26, 1906, minor children whose applications had not been filed up to April 26, 1906.

Taking the three acts above considered, as a whole, as the complete scheme of legislation providing for the enrollment of Cherokees for allotment, the difference between the meaning thereof, as contended for by the plaintiffs and by the defendants respectively, may be stated as follows:

Plaintiffs contend that the Act of July 1, 1902, established in them, as individuals, complete ownership of all the lands and all the other property of the Cherokees, which they had owned as a community on September 1, 1902; that the Secretary of the Interior was authorized and instructed to allot and distribute all the said property to the persons entitled to enrollment under the terms of the said act; that he was expressly forbidden to allot or distribute any part of the property to anyone else, and especially to any child born after September 1, 1902; that the terms of the act itself were broad enough to enable him not only to allot to each of the persons so enrolled land equal in value to 110 acres of average allottable lands of the Cherokee Nation, but, also, after doing that and after providing an allotment for each and every person entitled to enrollment

under the act in accordance with the terms thereof, to collect all the revenues due to the Cherokee Tribe, to deposit the same to the credit of the tribe along with its other funds in the Treasury of the United States, to pay therefrom all the debts of the tribe, to sell and dispose of any remaining property and deposit the proceeds of such sales along with the other funds in the Treasury of the United States, and to pay the residue, after settling all the debts, to the members of the tribe, *per capita*, living at the date of the distribution, and to the heirs of any deceased member whose name should be found on the finally approved roll of the tribe.

The defendants admitting that it was the apparent purpose of Congress to dispose of all the property under the provisions of the Act of July 1, 1902, says that no express provision was made for the disposition of the unallotted lands and of the undistributed funds; that this property, therefore, remained tribal property; that because it so remained tribal property, and because the existence of the Cherokee Nation was continued by virtue of the later provisions of the acts of Congress on the subject, Congress had the power to authorize, and that it did authorize, the Secretary of the Interior to allot and distribute the said property to 5,610 children born after September 1, 1902, to the exclusion of the members of the tribe enrolled under the Act of July 1, 1902.

In support of this contention defendants in their brief rely upon a strained construction of the language of the Act of April 26, 1906, as amended by the Act of June 21, 1906, based upon implication, and upon an incorrect and incomplete statement of the proceedings of Congress prior to the passage of the act, when the bill therein pending was under consideration by the committees of the House

and of the Senate having the same in charge, both of which, we submit, defeat the construction for which they contend.

IF THE ACT OF APRIL 26, 1906, AUTHORIZED THE PROPOSED ACTION OF THE SECRETARY, IT IS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

Obviously if appellants and other Cherokees enrolled under the Act of July 1, 1902, acquired vested rights in all the property of the Cherokee Nation, and if the Act of April 26, 1906, authorized the bestowal of some of that property upon other persons, it furnishes a clear instance of the taking of private property without due process of law. But the defendants insist that laws regarding Indians or agreements made with them, are not to be so narrowly construed as laws respecting, or agreements made with, other citizens, because of the supposed duty of Congress to care for and protect all Indians. We are not concerned at this moment with the suggestion that our lands and funds are to be bestowed upon Indians. So far as the persons enrolled under the Act of July 1, 1902, are concerned, their loss would be the same and their rights the same, neither greater nor less, if it were sought to bestow these lands and funds upon white persons; and we can not agree that there is any force in the suggestion, or authority for making it, that the supposed duty of Congress to provide for all Indians gives the United States the power to provide for them out of property belonging to other Indians—as is attempted to be done in this case. In support of their suggestion, defendants cite many decisions declaring the plenary power of Congress over Indian tribes and Indian lands. These decisions find their highest expression in the

cases of Lone Wolf vs. The United States, Cherokee Nation vs. Hitchcock and Marchie Tiger vs. The Western Investment Company.

These cases and others of their kind, except the case of Marchie Tiger, are discussed in our original brief, pages 50-58. That they declare the paramount authority of Congress over Indians in tribal relations, and its power to administer tribal estates, is unquestioned. But in the Lone Wolf case the court noted particularly that no question of the taking of property was involved; and Lone Wolf's Indians were paid for the lands taken by the government.

In Cherokee Nation vs. Hitchcock there was involved merely the question of the power of administrative control of tribal property.

In other cases cited by defendants and discussed in our original brief, there was involved the question whether there was a vested right in citizenship, or in an expectancy in tribal property as a member of a tribe yet in tribal relations.

In the case of Marchie Tiger (221 U. S., 286, 306) the opinion declares that it was the purpose of Congress to require a conveyance made by a full-blood Creek Indian to be approved by the Secretary of the Interior, and that, though the Indian had been made a citizen of the United States, "he was still a ward of the Nation, so far as the alienation of these lands was concerned" (p. 316), so that Congress with plenary power over the subject, might by a new act permit alienation of such lands, subject to the condition that the conveyance be approved by the Secretary of the Interior. The opinion further declares that it rests with Congress to determine when its guardianship over Indians shall cease, and that while it still continues, Congress has the right to vary its restrictions upon alienation of Indian

lands in the promotion of what it deems the best interests of the Indians. (P. 316.)

The sum of all the decisions cited by defendants is that there is no vested right in citizenship or membership in an Indian tribe; that the individual members of a tribe can not maintain an action for a right not vested; that, within limitations, Congress may restrict alienation of lands by an Indian; and that as to tribal property, the power to control and manage it rests in Congress. Beyond this, the courts have never gone. Certainly this Honorable Court has never declared that there is any power in Congress arising from its duty to Indians, or from any other source, to deprive Indians, citizens or savages, of the protection of the Constitution.

We do not deem it necessary to discuss the suggestion that Congress was attempting to equalize the Indians born after September 1, 1902, with those living on that date. We have tried to show that such was not the intention of Congress from the fact that Congress knew that there was a deficit of lands in the Cherokee Nation when the act was passed. (Original Brief, page 35 and, *supra.*)

We can not understand where the duty of equalizing Indians could ever rest upon Congress, except where it was dealing with Indians enjoying similar rights at the same time. If Congress had merely passed an act on July 1, 1902, and if in that act it had provided that a certain class of Indians should receive more lands and funds than a certain other class, and the act had never been submitted to the Indians for their ratification, the act might have been attacked for want of equalization, but if after making this positive agreement and after causing the Indians to accede to it, Congress, by subsequent legislation, can equal-

ize persons not in the contemplation of the agreement, with those so in contemplation, there is not the slightest doubt that Congress could at this date provide for children born since March 4, 1906, and that it may continue to do so until the last vestige of this property has been disposed of, if indeed that has not already been done.

Finally, if the contention that children born after September 1, 1902, may be enrolled and allotted, is based upon the idea that the unallotted property is tribal property, is it not evident that the giving of it to the afer-born children alone is the exclusion of by far the larger part of the tribe from sharing in it? To so hold, is to declare that those persons who had been already allotted were not members of the community or of the tribe, and that only a part of the tribe was entitled to share. The absurdity of this increases confidence in the position we have taken that Congress never intended the addition of nearly six thousand persons to those entitled under the Act of July 1, 1902, many of whom would receive twice as much out of the Cherokee estate as those enrolled under the agreement of July 1, 1902.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

No. 896.

LEVI B. GRITTS ET AL., APPELLANTS,

vs.

WALTER L. FISHER, SECRETARY OF THE INTERIOR, AND FRANKLIN MacVEAGH, SECRETARY OF THE TREASURY, APPELLEES.

APPEALED FROM THE COURT OF APPEALS, DISTRICT OF COLUMBIA.

BRIEF FOR THE CHEROKEE NATION

WILLIAM W. HASTINGS,
National Attorney for the Cherokee Nation, as Amicus Curiæ.

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BRIEF FOR THE CHEROKEE NATION.

Statement of the Case.

This suit is brought in the name of three plaintiffs, Levi B. Gritts, Richard M. Wolfe, and Frank J. Boudinot, without any authority, but over the protest and against the will of the Cherokee Nation, a tribe of Indians whose total enrollment aggregates 41,798 members, and seeks to restrain

the Secretary of the Interior and the Secretary of the Treasury from allotting lands or distributing moneys to the minor children born to members of the Cherokee tribe since September 1, 1902, and living on March 4, 1906, and is for the purpose of testing the constitutionality of section 2 of the act of Congress approved April 26, 1906 (34 Stat., 137), as amended by the act of June 21, 1906 (34 Stat., 325), authorizing the enrollment of minor children born to recognized and enrolled citizens of the Cherokee Nation, and granting to them an equal share in the allotment of Cherokee lands and in the distribution of Cherokee tribal moneys.

Section 2 of said act of April 26, 1906, is as follows:

> SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and re-enacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this

act as to allotments heretofore made, no contests shall be instituted against such allotment: *Provided*, That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United states.

The amendatory provision of the act of June 21, 1906, referred to is as follows:

That section two of the act entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby, amended by striking out thereof the words *"Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States."

Decision of Mr. Justice Stafford of the Supreme Court of the District of Columbia.

The decision of Mr. Justice Stafford of the Supreme Court of the District of Columbia critically examines the acts of 1902 and 1906, *supra*, and so concisely, yet fully, states all the questions involved in this case, that we have printed it in full herein for convenient reference as "Appendix A." Every contention of plaintiffs is examined, every section of law necessary to a determination of this case is analyzed, and all the decisions of this court then rendered are cited and reviewed. This opinion is so exhaustive that a further brief would seem unnecessary. It was affirmed by the Court of Appeals for the District of Columbia on November 5, 1911.

History of Enrollment Legislation.

It will be necessary to briefly review the history of enrollment legislation and the closing of the rolls in order that the court might understand this controversy.

Congress by an amendment to the Indian appropriation act approved March 3, 1893 (27 Stat., 612, 645), provided for the appointment of three commissioners to negotiate agreements with the Five Civilized Tribes for the purpose of extinguishing the tribal title to their lands either by cession to the United States in whole or in part or by allotment among the citizens of the respective tribes entitled thereto. This commission was officially designated "The Commission to the Five Civilized Tribes," but was commonly known as the "Dawes Commission" because its first chairman was ex-Senator Henry L. Dawes, long a member of the Indian Senate Committee and closely identified with Indian legislation. Two additional members were added to this commission by act of March 2, 1895 (28 Stat., 939). Complaint having been made that the respective nations and

their tribal courts or citizenship commissions were prejudiced against disputed applicants for citizenship, by an amendment to the Indian appropriation act approved June 10, 1896, in addition to the authority theretofore conferred upon it by law, the commission was authorized to hear and determine "the applications of all persons who may apply to them for citizenship in any of said nations," and the right of appeal was provided for from the decision of the commission to the United States court either on behalf of the tribe in which citizenship was sought or by the applicant.

By act of July 1, 1898 (30 Stat., 591), an appeal was provided for direct to the Supreme Court of the United States.

All applications for admission to citizenship having been presented and decided or pending upon appeal and the commission having failed thus far of its primary purpose to negotiate agreements with the respective nations looking to a dissolution of their tribal governments and allotment of their lands, Congress by section 21 of an act approved June 28, 1898 (30 Stat., 495), directed the commission to prepare a complete roll which should include all of the recognized or admitted citizens of the respective tribes and their descendants, instructing said commission in detail with great particularity how said roll should be prepared, because, as stated in said section,

> "the roll so made when approved by the Secretary of the Interior *shall be final*, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, *shall alone constitute the several tribes which they represent.*" (Italics ours.)

The commission was further instructed by an act approved May 31, 1900 (31 Stat., 221),

> "not to receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in the Indian Territory who has not been a recognized citizen thereof and duly and lawfully enrolled or admitted as such."

By the act of March 3, 1901 (31 Stat., 1073), Congress authorized the Secretary of the Interior to fix a date for the closing of the roll, as it had the power to do under the plenary authority exercised by Congress over Indian tribes (*Cherokee Nation vs. Hitchcock*, 187 U. S., 294; *Lone Wolf vs. Hitchcock*, 187 U. S., 533; Stephens case, 174 U. S., 445).

The Secretary of the Interior, acting under the authority of the above act, fixed the date for the closing of the Cherokee roll on July 1, 1902, and the roll was actually closed upon that date, and remained closed until after the ratification of the act of July 1, 1902, by the Cherokee people on August 7, 1902, which was promulgated August 12, 1902. The report of the Commission to the Five Civilized Tribes for the year ending June 30, 1902, contains the following:

> "Much difficulty having been experienced by the commission in effecting agreements with the several tribes which should enable the citizenship rolls to be closed, Congress, in the Indian appropriation bill of March 3, 1901 (31 Stat., 1073), embodied legislation calculated to overcome this obstacle. The provision referred to is as follows:
>
> "* * * *'The Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes, or either of them, for closing said roll, but upon failure or refusal of said tribes, or any of them, to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no names shall be added thereto.'* (Italics ours.)

"It will be remembered that up to that date all efforts to consummate an agreement with the Cherokees had failed, and while agreements had been made with the other four tribes, that with the Choctaws and Chickasaws did not cover this important feature.

"In November, 1901, under instructions from the Department, the commission renewed its effort to negotiate an agreement with the Cherokees fixing the date for closing their rolls. Being unsuccessful at that time, a further effort was made in December, 1901, also without result. Thereupon the Secretary, acting under the provision of law above quoted, on January 15, 1902, *directed the commission to receive no applications for enrollment as Cherokee citizens after July 1, 1902.*" (Italics ours.)

However, the prerequisites recited in the official order of the Secretary of the Interior are presumed to be true in the absence of proof to the contrary (*Nofire vs. United States*, 164 U. S., 657).

The closing of the roll under the above act of Congress is referred to by this court in the case of *Garfield vs. Goldsby* (211 U. S., 249) as follows:

"By the act of March 3, 1901 (31 Stat. L., 1077, c. 832), it was provided that the roll made by the Commission to the Five Civilized Tribes as approved by the Secretary of the Interior should be final, and authorized the Secretary of the Interior to fix the time, by agreement with the tribes, for the closing of the roll, and upon failure of such agreement, then the Secretary of the Interior should fix the time for the closing of the rolls, *and after which no name should be added thereto.*" (Italics ours.)

Section 25 of the act of July 1, 1902 (32 Stat., 716), *extended the date of closing the Cherokee roll to September 1, 1902.* Commenting upon the closing of the rolls and of the extension of the time as provided by said section 25, the Commission to the Five Civilized Tribes, in its annual report for June 30, 1903, says:

> "As *this extended the date which had previously been fixed* by the Secretary of the Interior for the closing of the Cherokee rolls, the commission *resumed the hearing of original applications* for enrollment immediately after the ratification of the *agreement was proclaimed.* Between that date, however, and the date upon which the rolls were finally closed *but few applications were received.*" (Italics ours.)

Section 2 of the act of April 26, 1906, *supra,* as amended by the act of June 21, 1906, *supra,* again extended the date as of which the Cherokee roll should be made from September 1, 1902, to March 4, 1906, by authorizing the enrollment of minor children born to enrolled Cherokee parents between September 1, 1902, and March 4, 1906, and permitting them to participate in the allotment and distribution of the tribal lands and funds.

On May 11, 1900, the Commission to the Five Civilized Tribes began the making of a roll of the citizens of the Cherokee Nation under the allotment act of June 28, 1898 (30 Stat., 495), and was still engaged in the making of this roll when the act of March 3, 1901 (31 Stat., 1073), the allotment act of July 1, 1902, *supra,* and the amendatory acts of April 26, 1906, *supra,* and June 21, 1906, *supra,* were passed. Under the act of March 3, 1901, *supra,* the Secretary of the Interior fixed the closing of the roll as of July 1, 1902. The date of the closing of the roll was afterwards extended by the act of July 1, 1902, *supra,* to September 1, 1902, and by the act of April 26, 1906, *supra,* was further

extended to March 4, 1906, as of which date it was finally completed.

On September 28, 1905, the Cherokee National Council, in pursuance of the provisions of the Cherokee constitution, passed an act approved November 7, 1905, by the President of the United States, which provided, among other things, for the appointment by the Principal Chief of a commission consisting of three persons to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs (excepting all matters pending in the United States courts), of which the Principal Chief was made *ex-officio* a member. The commission was appointed in accordance with the above act.

On September 29, 1905, the commission was instructed by a joint resolution of the National Council of the Cherokee Nation that it was the sense of the Cherokee people that

> "all children born since September first, nineteen hundred and two, and prior to March fourth, nineteen hundred and six, who but for the limitation contained in section twenty-five of the act of Congress of July first, nineteen hundred and two, would be entitled to share equally with children born prior thereto, and that said participation should, if possible, be equal in every respect in the lands and moneys as provided by said act of Congress. If this cannot be done, then a sum of money should be given to each of said children as will equal so far as possible the share which has been given others under said act."

In consequence of the efforts of the Cherokee commission appointed and instructed as aforesaid, the provision for the enrollment of minor children living on March 4, 1906, born of enrolled Cherokee citizens, was incorporated in the act of April 26, 1906, *supra,* and amended by the act of June 21, 1906, *supra,* so as to remove any doubt that it applied to the Cherokee Nation.

After the allotment to all of those entitled under the provisions of the act of July 1, 1902, *supra,* there remains sufficient lands and funds to provide for the allotment of all of the minor Cherokee children entitled to enrollment under the act of April 26, 1906, *supra,* as amended by the act of June 21, 1906, *supra.*

Section 63 of the act of July 1, 1902, *supra,* provided that:

> "The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred six."

But by a joint resolution of Congress approved March 2, 1906 (32 Stat., p. 822), it was further extended as follows:

> "The tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby *continued in full force and effect for all purposes* under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law."

And section 28 of the act of April 26, 1906, *supra,* contained the following provision further continuing the Cherokee tribal government:

> "That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year."

And no other act has subsequently been passed discontinuing the Cherokee tribal government.

It is conceded that there are enough unallotted tribal lands and undistributed tribal funds to provide allotments for enrolled members of the Cherokee Nation, including those enrolled under section 2 of the act of April 26, 1906, *supra*, as amended by the act of June 21, 1906, *supra*.

Decision of the Court of Claims.

A suit was instituted in the name of David Muskrat and J. Henry Dick *vs.* The United States, in the Court of Claims, under the jurisdictional act approved March 1, 1907 (34 Stat., 1015-1028), to test the constitutionality of the same provisions called in question in this suit, and their constitutionality was sustained by the Court of Claims (44 C. Cls., 137) in an exhaustive opinion rendered January 4, 1909. The Court of Claims in that case collects all of the facts and cites all the provisions of law necessary to a full understanding of this case. This court ordered the case dismissed upon the ground that it was a moot case.

The Court of Claims in its opinion found as conclusions of law as follows:

> 1. The petitioners and all other members of the Cherokee Nation of Indians were citizens of the United States on July 1, 1902, the date of the passage of the act of that date, as were their children thereafter born, as set forth in Finding V.
>
> 2. The Cherokee Nation is and always has been recognized by the United States as a distinct political community, subject only to the paramount authority of the United States.
>
> 3. The tribal existence and present tribal government of said Cherokee Nation were existing at the date of the passage of the acts April 26 and June 21, 1906, as set forth in Finding XV.

4. No citizen of the Cherokee Nation has any vested interest in the unallotted lands of said nation or in the undistributed funds in the Treasury of the United States to the credit of said nation or tribe.

5. Section 2 of the act April 26, as amended by the act June 21, 1906, was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation, as instructed by the national council of the Cherokee Nation, with the approval of the President of the United States, as set forth in Findings XI, XII, and XIII.

6. The Congress have plenary power to guard, protect, and administer upon the tribal property of the Cherokee Nation, and that power is political, and is for the legislative branch and not for the courts to determine.

7. The provisions of the act April 26, as amended by said act of June 21, 1906, authorizing the enrollment of minor children born after September 1, 1902, and living on March 4, 1906, is a valid constitutional statute, and the minor children so enrolled, as therein provided and set forth in the findings herein, are entitled to remain upon the final Cherokee roll for the purpose of participating in the allotment of the Cherokee lands and in the distribution of the Cherokee tribal funds in the same manner and to the same extent as Cherokee citizens enrolled under the acts June 28, 1898 (30 Stat. L., 495), May 31, 1900 (31 *ibid.*, 221), and July 1, 1902 (32 *ibid.*, 716).

8. The petition is therefore dismissed and judgment ordered for the defendants.

The Marchie Tiger Case, (221 U. S., 286).

The case of Muskrat and Dick *vs.* The United States, appealed from the Court of Claims, *supra*, was argued in this court in connection with the case of Tiger *vs.* Western Investment Company (221 U. S., 286), November 30 and December 1 and 2, 1910, because similar questions were involved in the two cases. This court directed the Court of Claims to dismiss the petition in the case of Muskrat and Dick *vs.* The United States, because the questions in that case were moot. This court, after assigning the Tiger case for reargument, delivered an opinion in that case on May 15, 1911, in which practically every question involved in the case at bar was decided.

Counsel for appellants have heretofore contended:

1st. That the tribal government of the Cherokee Nation was dissolved by the act of July 1, 1902, and the tribal property individualized, and that thereafter Congress has no power to legislate concerning said property.

2d. That the members of the Cherokee tribe were made citizens of the United States by the act of March 3, 1901, and that the granting of this citizenship conditioned the plenary power of Congress over the property of the Cherokee tribe of Indians.

3d. That the members of the Cherokee tribe of Indians enrolled as of date September 1, 1902, had a vested interest in and to the unallotted lands and undistributed moneys of the Cherokee tribe.

4th. That Congress did not have the same plenary power over the lands belonging to the Cherokee tribe of Indians because of the difference in the character of title.

5th. That section 2 of the act of April 26, 1906 (34 Stat., 137), as amended by the act of June 21, 1906 (34 Stat., 325), properly construed, did not authorize the enrollment of minor children born subsequent to September 1, 1902.

This contention was for the first time urged before the Court of Appeals.

6th. That if section 2 of the act of April 26, 1906, *supra*, as amended, be construed to authorize the enrollment of minor children born of enrolled parents up to and living on March 4, 1906, then the same was unconstitutional and void, in that it deprived the members of the Cherokee tribe living on September 1, 1902, of vested property rights.

Nearly all of the above questions were decided by this court in the Marchie Tiger case against the contention of appellants.

This court held that the Creek tribal government was still in existence; that Marchie Tiger was a member of that tribe and was still a ward of the government; that it was for Congress to say when the relationship of guardian and ward should cease; that making members of the Indian tribes citizens of the United States by the act of March 3, 1901, *supra*, did not condition the power of the government over their tribal property, and the power of Congress to legislate was not limited because of the character of the title by which the Creek tribe of Indians held their lands.

BRIEF AND ARGUMENT.

Status of the Cherokee Nation.

The second conclusion of law in the opinion of the Court of Claims hereinabove quoted defines the status of the Cherokee Nation.

The Cherokee Nation has been recognized as a body politic, a domestic dependent nation, subject only to the paramount authority of the Government of the United States, for more than a century, and its status has been the subject of so many judicial decisions by the courts, including decisions of the Court of Claims and of this court, wherein its history as a nation has been repeatedly so exhaustively reviewed and its relation to the Government of the United States so clearly defined, that reference to them is all that is deemed necessary.

A treaty was made with the Cherokees by the United States as early as 1785 (7 Stat., 18), and from time to time thereafter numerous treaties were entered into with the Cherokees recognizing them as a nation, the last being dated July 19, 1866 (14 Stat., 799). Congress by an act approved March 3, 1871, section 2079, Revised Statutes, determined to change the policy of the United States in dealing with Indian nations or tribes, and instead of negotiating treaties with them to govern them directly by acts of Congress. Under the treaty of 1835 (7 Stat., 478) and treaties made prior thereto the Cherokees removed west of the Mississippi river, became reunited by an act of union of date July 12, 1838, received a patent to their lands, of which the present lands are a part, from the President of the United States, dated December 31, 1838, and adopted a written constitution September 6, 1839. In accordance with this constitution the Cherokee government was recognized, consisting of three departments, the legislative, the executive, and the

judicial, and a code of written laws was adopted, which laws were enlarged upon, amended, or repealed, in whole or in part, from time to time. (Cherokee Trust Funds, 117 U. S., 288; *Cherokee Nation vs. Southern Kansas Railway Co.,* 135 U. S., 641; *Cherokee Nation vs. Journeycake,* 155 U. S., 196; *Delaware Indians vs. Cherokee Nation,* 193 U. S., 127; Compiled Laws of the Cherokee Nation, 1892; Intermarried White cases, 40 C. Cls., 411.)

These decisions abundantly sustain conclusion two of the Court of Claims.

Cherokee Tribal Government Still in Existence and Recognized as Such.

This court in the Marchie Tiger case (221 U. S., 286), held that the Creek tribal government was in existence in the following language:

> "Section 28 of the act provides for the continuance of the tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes or Nations, but places certain restrictions upon their right of legislation, making the same subject to the approval of the President of the United States."

And in the same case the court said:

> "He (Marchie Tiger) was still a ward of the nation so far as the alienation of these lands was concerned, *and a member of the existing Creek Nation.*" (Italics ours.)

This court again, on February 21, 1910, in the case of Ballinger *vs.* Bell Frost, (216 U. S. 240), speaking through Mr. Justice Brewer, said: *"The nations have not become extinct and are still residents on the lands."* (Italics ours.)

The Cherokee Nation is still recognized as a political community by the political department of the United States.

The courts have uniformly held that as long as a nation of Indians was recognized in the tribal capacity by the political department of the United States they were under the supervisory control of Congress. (The Kansas Indians, 5 Wall., 756, 757; *Jones vs. Meehan*, 175 U. S., 1, and cases cited.)

Section 63 of the act of July 1, 1902, looked to a complete administration upon the entire Cherokee estate prior to March 4, 1906, and provided "the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906," but at that time it was found that the enrollment work had not been completed and a large part of the Cherokee lands were still unallotted, and Congress by joint resolution approved March 2, 1906 (34 Stat., 822), continued the tribal government in the following language:

> "The tribal existence and present tribal government of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby *continued in full force and effect for all purposes* under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law."

Section 28 of the act of April 26, 1906 (34 Stat., 137), continued the tribal government of the Cherokee Nation "until otherwise provided by law," and no act of Congress has subsequently been passed discontinuing the Cherokee tribal government.

The record and pleadings in this case show that the act of the Cherokee council under which the Cherokee commission was appointed was approved by the Principal Chief and by the President of the United States November 7, 1905, and also the joint resolution instructing said commission

on August 17, 1907, *and the approval of said acts by the President was a recognition of the Cherokee Nation by the political department of the United States.*

As late as January 27, 1908, the debates of the Senate of the United States show that the Senate refused to insert the word "late" as an amendment before the words "Five Civilized Tribes" in the Indian appropriation bill then pending, which is an expression of the sense of the Senate that the tribes were not regarded as dissolved.

The Court of Claims also recognized the Cherokee Nation as a political community when on October 7, 1904, it permitted it to intervene in the Intermarried White cases (40 C. Cls., 411), and the Supreme Court recognized it when it rendered its decision on appeal November 5, 1906, (203 U. S., 76). Also in the Delaware case (193 U. S., 127), decided February 23, 1904.

The Court of Claims, after quoting section 63 of the act of July 1, 1902, *supra,* the joint resolution of Congress approved March 2, 1906, *supra,* and from section 28 of the act of April 26, 1906, continuing the tribal existence and present tribal government of the Cherokee Nation, said:

> "Therefore, in considering the questions involved, we shall assume the validity of those provisions continuing the tribal existence and tribal government of the Cherokee Nation in force and effect until all property of said nation shall have been distributed among the individual members thereof."

In the case of Brown and Gritts *vs.* The United States, commenting upon the continuance of the Cherokee tribal government, the Court of Claims on February 8, 1909 (44 C. Cls., 283), used the following language:

> "As the United States is the self-constituted guardian of the Indians with plenary authority over their tribal relations, it is for Congress and Congress alone to determine when that relation shall cease."

In other words, when Congress, by their legislation, have declared that the tribal government of the Cherokees shall "continue in full force and effect for all purposes authorized by law until otherwise provided by law," the courts cannot enter into the quantum of authority remaining in the tribe, and by construction defeat the will and purpose of Congress.

And the court in the same opinion also said:

> "Nor will we analyze the acts to ascertain of how much authority the tribal government has been shorn."

In the case of Kansas Indians, *supra*, upon the question of the diminished power of the tribal government the Supreme Court held:

> "Because some of those customs have been abandoned, owing to the proximity of their white neighbors may be a witness of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved."

And further on in the same opinion the court said:

> "But the action of the political department of the Government settles beyond controversy, that the Shawnees are as yet a distinct people, with a perfect tribal organization. Within a very recent period their head man negotiated a treaty with the United States, which, for some reason not explained in the record, was either not sent to the Senate, or, if sent, not ratified, and they are under the charge of an agent who constantly resides with them. While the General Government has a superintending care over their interests and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this *status* when she accepted the act admitting her into the Union."

We call the attention of the court to several provisions of the acts of July 1, 1902, *supra,* and April 26, 1906, *supra,* as showing the attitude of Congress towards the continuation of the tribal relations. We do this in view of the persistent, and to us unreasonable, contention of the appellants that the Cherokee tribal existence and government are limited to the allotment of public lands and a distribution of public funds. For instance, section 29 of the act of July 1, 1902, *supra,* under which all allotments have been and are still being made, provides that—

> "the roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, *one with the Principal Chief of the Cherokee Nation,* and one to remain with the Commission to the Five Civilized Tribes."

Section 32 provides for the continuation of the Cherokee tribal schools, "under the supervision of a supervisor appointed by the Secretary and a school board *elected by the National Council.*"

Section 33 provides that all teachers shall be examined by said supervisor and school board, and section 34 provides that *"all moneys for carrying on the schools shall be appropriated by the Cherokee National Council."*

Section 37 provides that damages for public highways or roads, other than on section lines, shall be paid out of the tribal funds, *"while the tribal government continues, and to be paid by the Cherokee Nation during that time."*

Section 58 provides the manner in which patents to allotments shall be executed; that all of the right, title, and "interest of the Cherokee Nation, and of all other citizens in and to the lands embraced in his allotment certificate" shall be conveyed by the Principal Chief of the Cherokee Nation to the allottees.

Section 67 of the act provides for the payment of the

indebtedness of the tribe existing at the date of the ratification of the act, and how the warrants shall be drawn therefor *"hereafter and prior to the dissolution of the tribal government."*

Section 68 provides for the institution of suits in the Court of Claims *for the collection of claims of the Cherokee Nation, and for the appointment of attorneys by the tribe, acting through its Principal Chief.*

Section 6 of the act of April 26, 1906, *supra,* provides—

> "That if the Principal Chief of the Choctaw, Cherokee, Creek or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States, or if any such executive become permanently disabled, *the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability, or death of the incumbent, by appointment of a citizen by blood of the tribe."*

Section 11 provides for the collection of the tribal revenues before and after the dissolution of the tribal government, and the settlement of the accounts of all tribal officers after the dissolution of the government.

See also, as to the duties and responsibilities of the existing Cherokee government, sections 18, 27, and 28 of the act of April 26, 1906.

The Cherokee tribe and nation is also recognized in numerous provisions of the act of May 27, 1908 (35 Stat., 312).

The Cherokee Nation, by its recognized and duly appointed attorney, was allowed to file an intervening petition in the case of Muskrat and Dick *vs.* The United States, *supra,* and participate in the argument.

The Cherokee Nation is also recognized by the following proviso of section 8 of the act of May 29, 1908 (35 Stat., 444):

> "That the Cherokee Nation shall have the right to protest against the payment of any claim to any such person or persons, and upon the protest being filed by or on behalf of the Cherokee Nation the claim of any such person or persons shall be referred to the Court of Claims, and said court is given full jurisdiction to hear and determine the same."

The Cherokee government was certainly as much of a government and had as much power on April 26, 1906, the date of the second extension by Congress for closing the Cherokee roll, as it had on July 1, 1902, the date of the first extension of the closing of said roll, to September 1, 1902, and was as much of a government with as much power as it had on January 15, 1902, the date when the Secretary of the Interior issued the first order under the act of March 3, 1901, closing the roll on July 1, 1902. They were citizens of the United States upon all of said dates.

The reports of the Commission to the Five Civilized Tribes and the record and pleadings in this case all show that there are yet lands unallotted and tribal funds undistributed. Patents must be issued for those lands signed by the Principal Chief as provided in section 68 of the act of July 1, 1902, *supra.*

It results that there can be nothing in the contention of petitioners that the tribal government was abolished when the act of July 1, 1902, *was ratified and promulgated on August* 12, 1902.

It is urged that the Cherokees are citizens of the State of Oklahoma as well as of the United States. The case of *United States vs. Rickert* (188 U. S., 432), from which we have quoted, disposes of that contention, but attention is invited to the historical fact that the State of Oklahoma was not admitted into the Union until November 16, 1907, whereas the provision of the act providing for the enrollment of minor children which this suit seeks to have declared unconstitutional was approved April 26, 1906.

The enabling act admitting Oklahoma to statehood in section 3 provided:

> That nothing contained in the said constitution shall be considered to limit or impair the rights of person or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished), *or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise,* which it would have been competent to make if this act had never been passed,

which clearly shows that Congress had not up to that time, nor was it the purpose of Congress by that act, to emancipate the Five Civilized Tribes from the control of Congress.

Every provision of the several acts which counsel for appellants say dissolved the Cherokee tribal government was passed prior to July 1, 1902, except section 28 of the act of April 26, 1902, *supra,* making applicable to the other Five Civilized Tribes the act of March 3, 1901 (31 Stat., pp. 1058, 1077), requiring the approval of the President to the acts of the tribal councils.

It would seem, therefore, that the third conclusion of law found by the Court of Claims:

> "The tribal existence and present tribal government of the said Cherokee Nation were existing at the date of the passage of the acts of April 26 and June 21, 1906,"

is abundantly sustained.

No individual citizen of the Cherokee Nation has any vested interest in the unallotted lands or the undistributed funds of the tribe.

The title to the unallotted lands is in the Cherokee Nation and not in the individual citizens. The patent issued by the President of the United States on December 31, 1838, conveyed the land to the "Cherokee Nation."

Section 2 of article 1 of the Cherokee constitution provides:

> The lands of the Cherokee Nation shall remain common property.

This provision of the Cherokee constitution was amended on November 26, 1866, to read as follows:

> The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article twenty of the treaty of nineteenth of July, eighteen hundred and sixty-six, between the United States and the Cherokee Nation.

The national council of the Cherokee Nation by the act of September 28, 1905, creating the Cherokee commission, and by joint resolution No. 1, instructing said commission, requested the allotment of the Cherokee lands and the distribution of the moneys among all citizens entitled thereto born prior to March 4, 1906.

It was held in the Cherokee Trust Funds case (117 U. S., 288) that whatever title the Cherokees have is in the tribe and not in the individuals, although held by the tribe for the common use and equal benefit of all members.

In the case of *Cherokee Nation vs. Journeycake* (155 U. S., 196), the court held:

> Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees or any of them.

In the case of *Cherokee Nation vs. Hitchcock* (187 U. S., 294), *decided December 1, 1902, since the enactment of the act of July 1, 1902,* providing for the allotment of the Cherokee lands, the court again reviews the treaties made with the Cherokees, discusses the title to their lands, and reaffirms and quotes from its former decisions holding that the title is in the nation and not in the individual citizens as follows:

> "Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. *The Cherokee Trust Funds,* 117 U. S., 288, 308. The manner in which this land is held is described in *Cherokee Nation vs. Journeycake,* 155 U. S., 196, 207, where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said: 'Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them.' "

Particular attention is invited to the above quotation for the reason that this opinion was rendered on December 1, 1902, after the act of July 1, 1902, was enacted, which appellants claim individualized the title to the tribal lands.

In the following paragraph of the opinion of the court in the above case reference is made to the power of Congress

to control and develope "the *tribal property* which still remains subject to the administrative control of the Government." The court was then considering the authority of the Secretary of the Interior to lease for oil purposes for a period of years some of the unallotted Cherokee lands, holding that those lands were at that time still "tribal property," and this court sustained the Secretary of the Interior in that view. If the unallotted lands were tribal property on December 1, 1902, when the opinion in the case of Cherokee Nation *vs.* Hitchcock was rendered, then those lands remaining unallotted are still tribal, because appellants do not claim that they were individualized by any subsequent legislation. Their claim is based solely upon the act of July 1, 1902.

The allotment act of July 1, 1902 (32 Stat., 716), does not change or individualize the title to the unallotted lands. Section 60 of that act provides:

> "Any allottee accepting such patent shall be deemed to consent to the allotment and conveyance of all lands of the tribe as provided in this act to *relinquish all his right, title, and interest to the same except in the proceeds of lands reserved from allotment.*"

The "lands reserved from allotment" mentioned in said section are described in detail in section 24 of the same act and do not extend to unallotted tribal lands. Section 11 of the act of July 1, 1902 (32 Stat., 716), provided for the allotment to each enrolled citizen "land equal in value to 110 acres of the average allottable land of the Cherokee Nation" only, and section 21 of said act made the allotment certificate "conclusive evidence of the right of the allottee to the tract of land described therein." *No attempt was made in the act to individualize the unallotted lands, but the title was continued in the tribe.*

All of these authorities are reviewed by the Court of Claims in its opinion in this case, and the court held that the title to the unallotted lands was in the tribe in the following language:

> "Under the authorities cited we do not believe rights became vested in the Cherokees until there was an actual severance of the communal property and the issuance of a patent, and then only to the extent of the propery therein actually conveyed to the allottees pursuant to law."

Individual citizens have no vested rights in unallotted lands or tribal funds. This contention was pressed in the case of *Stephens vs. The Cherokee Nation* (174 U. S., 445), where certain applicants in the Cherokee Nation had been finally denied citizenship, and in the other nations admitted to citizenship under the act of June 10, 1896, by the United States court upon appeal. Congress having provided by an act approved July 1, 1898, for an appeal to the Supreme Court, the case was appealed, and upon this point the court said:

> "The mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship, is placed by the judgment of a lower court beyond the power of reorganization by a higher court, though subsequently authorized by general law to exercise jurisdiction."

And it was further held in the same opinion:

> "The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involved a contradiction in terms."

In the case of *Wallace vs. Adams* (143 Fed. Rep., 716) the defendant was admitted to citizenship in the Choctaw Nation by the United States court under the act of June 10, 1896, and by the Supreme Court upon appeal. The Atoka agreement providing for the allotment of lands of the Choctaw and Chickasaw nations, entered into April 23, 1897, was ratified by Congress June 28, 1898 (30 Stat., 495). Practically the only contention of the defendant was that he had been finally enrolled as a citizen of the Choctaw Nation; that he had taken possession of and improved a farm upon the public domain, *and that his right to the land became vested when the allotment agreement was ratified by Congress June 28, 1898.* An exhaustive opinion was rendered by the court in this case, and upon the question of *vested rights* the court held:

> "But *none of the authorities* cited contains a decision that one has a *vested right* in the judgment of citizenship which the legislative department of the United States may not lawfully disturb, although one of the ultimate consequences of such a judgment, if undisturbed, might be an interest in land and other property."

The Supreme Court upon appeal in this case (204 U. S., 415) sustained the decision of the Circuit Court of Appeals and quoted at length with approval its former decision in the Stephens case, *supra* (*Roff vs. Burney,* 168 U. S., 218).

The joint resolution of Congress approved March 2, 1906 (34 Stat., 822), continuing the Cherokee tribal government contains a legislative recognition that there was then in existence tribal property. The tribal government was continued in full force and effect for all purposes *"until all property of such tribe or the proceeds thereof"* shall be distributed among those entitled.

The Court of Claims in its opinion said:

"We must assume that Congress had some purpose in keeping alive the tribal government until March 4, 1906, and by subsequent acts continuing the same in full force for all purposes under existing laws until all the lands of the nation and the funds to its credit shall have been allotted and distributed. By these acts the Government asserted its continued guardianship until the final distribution of the common property; and under the authorities cited we think it cannot be successfully controverted that if before any allotments had been made under the act of 1902, Congress by amendment had inserted the date March 4, 1906, in lieu of September 1, 1902, allotments as of the latter date would have been valid and effective to bind all, as under the authorities cited, no rights could vest in severalty in communal property by the mere force of a statute. If they could, then, under the act of March 3, 1901, *supra*, they would have vested as of July 1, 1902, the date fixed by the Secretary of the Interior by authority of said act of 1901. But as before stated the case here proceeds upon the theory of the validity of the extension to September 1, 1902.

"Under the authorities cited we do not believe rights became vested in the Cherokees until there was an actual severance of the communal property and the issuance of a patent, and then only to the extent of the property therein actually conveyed to the allottees pursuant to law."

The Court of Claims further on in its opinion exhaustively reviews all of the provisions of the act of July 1, 1902, *supra*, calling attention to the fact that by section 11 of said act the Commission to the Five Civilized Tribes was limited in the allotment of lands to citizens:

> By section 11 of said act the Commission to the Five Civilized Tribes was not only limited in the al-

> lotments to "land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation," but section 18 of the act makes it unlawful, after ninety days from the date of ratification, "for any member of the Cherokee tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation;" and for any violation thereof he "shall be deemed guilty of a misdemeanor," punishable by fine of not less than $100 and "shall forfeit possession of any property in question."

Attention is also invited by the Court of Claims to the provision of section 72 of said act, where it is made the duty of the Secretary of the Interior to collect a grazing tax upon cattle grazed "on lands not selected in allotment by citizens" for the benefit of the tribe. Thereupon the Court of Claims says:

> "The act being silent as to the disposition of the unallotted lands, as the claimants concede, further legislation was necessary therefor—and this, also, the claimants concede; but they in effect say that Congress by the act of July 1, 1902, limited their power to allot such lands to any but the allottees under said act.
>
> "The omission in the act to provide for unallotted lands was supplied by section 16 of the act of April 26, 1906, which, in substance, provides for the sale of any unallotted lands and the payment of the proceeds thereof into the Treasury of the United States to the credit of the tribe.
>
> "Certainly Congress did not intend that rights should become vested in lands for the allotment or other disposition of which no provision was made in

> the act. Nor do we believe the language of the act of 1902 is susceptible of such construction. It may be inferred that Congress, by section 5 of the act of April 26, 1906, as amended, providing that patents or deeds to allottees should be recorded 'and when so recorded shall convey legal title,' thereby intended that allottees should acquire legal title only after the patents or deeds to them, respectively, had been recorded."

Our contention is that the members of the tribe acquired only a vested right to the lands actually allotted to them, and that the title to the unallotted lands still remained in the tribe.

In the case of *Conley vs. Ballinger,* 216 U. S., 84, the plaintiff brought a suit very similar to this one to enjoin the Secretary of the Interior from disposing of an Indian cemetery reserved from allotment in a treaty made with the tribe of Wyandotte Indians. The plaintiff alleged that she was a citizen of the United States, and that those she represented had an undivided interest in and to the unallotted tract of land, but the court held that inasmuch as this particular tract had not been allotted that:

> "therefore it remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use of the Wyandottes. But the right of the Wyandottes was in them only as a tribe or nation. The right excepted was a right of the tribe."

That is our case exactly. We contend that the unallotted lands were not individualized, but remained *"as the whole of the land had been before,"* and that the title to the land was in the tribe and not in the individual.

This question was decided by the Circuit Court of Appeals, 8th Circuit, in the case of *Hayes vs. Barringer* (168 Fed. R., 221), March 13, 1909, appealed from the Chicka-

saw Nation, one of the Five Civilized Tribes. A will had been made by an enrolled member of the tribe devising land prior to its being selected in allotment. In that case the court held:

> "But was the interest of this Chickasaw Indian in these lands devisable in 1903? At that time these were the lands of the Choctaw and Chickasaw Nations, held by them, as they held all their lands, in trust for the individual members of their tribes, in the sense in which the public property of representative governments is held in trust for its people. But these were public lands, and, while the enrolled members of these tribes undoubtedly had a vested equitable right to their just shares of them against strangers and fellow-members of their tribes, they had *no separate or individual right to or equity in any of these lands which they would maintain against the legislation of the United States or of the Indian nations.* (Italics ours.) *Stephens vs. Cherokee Nation,* 174 U. S., 445, 488, 19 Sup. Ct., 722, 43 L. Ed., 1041; *Cherokee Nation vs. Hitchcock,* 187 U. S., 294, 23 Sup. Ct., 115, 47 L. Ed., 183; *Lone Wolf vs. Hitchcock,* 187 U. S., 553, 23 Sup. Ct., 216, 47 L. Ed., 299; *Wallace vs. Adams,* 143 Fed., 716, 74 C. C. A., 540; *Ligon vs. Johnston* (C. C. A.), 164 Fed., 670.

In the case of *Ligon vs. Johnston* (164 Fed. R., 670), the same being also a case from the Chickasaw Nation, decided September 30, 1908, the court held that no individual had any vested interest until the land was actually segregated to him in the following language:

> Until specific, private, individual rights attach pursuant to law, the enforcement of such trusts must be at the bar of public conscience. They are not justiciable in the courts. The disposition of the tribal

> property of the Indian tribes falls within the legislative domain, the power of Congress is supreme, and its action is conclusive upon the courts.

In the above case the court refers to the act of April 26, 1906, with approval.

It will be observed that this case sustains our contention exactly, and that is that petitioners "had no separate or individual right to or equity in any of these lands which they could maintain against the legislation of the United States or of the Indian nations."

The appeal from the decision of the Circuit Court of Appeals in the above case was by this court dismissed on December 11, 1911, and the above decision is therefore final.

Mr. Justice Stafford, upon the authority of the Cherokee Trust Funds case (117 U. S., 288) and the constitution of the Cherokee Nation, article 1, section 2, held:

> "The individual members of the nation had no property rights therein that could be enforced by any legal proceedings."

He then reviews the act of 1902 section by section to ascertain whether there is anything in that act which would change the title to the unallotted lands, and after a critical analysis of that act found:

> "No provision was made, however, for any further allotment of any lands that might remain after the allotment provided for by the act. Some thirty-eight thousand Cherokees were enrolled under this act, and it turned out that there were several thousand acres of land outside the reservations that were not allotted and were not required for allotment in order to give each enrolled Cherokee his one hundred and ten acres, or the equivalent thereof. It is as to these surplus acres that the question arises so far as the question relates to lands."

And after citing several sections of the act of 1902, referring to "the tribe" and tribal property and the payment of tribal obligations, indicating that it was not the purpose of Congress to individualize the tribal money, states:

> "If Congress intended that the surplus funds should be tribal property it is highly probable that it intended that the surplus acres should also be tribal property. To leave the ownership of several thousand acres in 38,000 individual owners, requiring the joinder of all in any conveyance thereof and entitling each to a partition in a court of equity, is a thing which it is not likely that Congress intended to do. Other legislation with respect to these lands must have been contemplated."

Again he states in his opinion:

> "But as to all this property, both the surplus acres and the surplus funds, it is quite plain that the right of the enrolled citizens was by virtue of their citizenship. The title still rested in the Cherokee Nation, whose existence was carefully and purposely continued until such time as an actual division should be made."

After stating the contention of the plaintiffs in which they claimed that the provisions of the act of 1906 were unconstitutional as depriving them of vested property rights under the act of 1902, he holds:

> "The provision amounts to an enlargement of the definition of citizenship. The plaintiffs and the other citizens enrolled as of September 1, 1902, were declared by the act of 1902 to be citizens and all the citizens of the Cherokee Nation. Congress had undoubted power to make this declaration, to define who should be citizens, and to determine who were

citizens in fact. It was a legislative power inherent in Congress by virtue of its supreme authority over the tribe and its property. The fact that certain property rights were attached to citizenship did not impair its power.

Wallace *vs.* Adams, 204 U. S., 415; Stephens *vs.* Cherokee Nation, 174 U. S., 445.

"This legislative power was not exhausted by the exercise of it in 1902. Congress still had authority to modify its definition of citizenship, or to change its method of determining who were citizens in fact."

And then he adds:

"It was still dealing with the tribe, and until individual property rights had become vested, it had the power which all legislatures have to alter and amend the law."

And in conclusion he states:

"We have already pointed out the reasons which require us to hold that the enrolled citizens were not vested as individuals with property rights in the surplus acres and funds. If we are right in so holding, the only ground of complaint which the plaintiffs can have is that Congress has enlarged the roll of citizens, and has thereby diminished their proportionate shares of tribal property."

And he answers this contention as follows:

"But their right to tribal property by virtue of citizenship is not a vested property right which they can enforce individually. Such a right is derivative, and depends upon the right of the tribe. It cannot be greater than the right of the tribe itself, and that right is subject to the paramount authority of Con-

gress. Hayes *vs.* Barringer, 168 Fed., 221; Conley *vs.* Ballinger, 216 U. S., 84; Fleming *vs.* McCurtain, 215 U. S., 56."

After carefully reviewing all of the claims of appellants the Court of Appeals, referring to that act, said:

> "The act does not expressly declare what the Secretary shall do with the remaining land, after making the allotments of 110 acres to each member of the tribe properly enrolled; but we think it may be assumed that so long as the tribal government was to continue, Congress intended that the community property, not allotted, should remain community property, and that the common charges and expenses should be paid therefrom before such surplus would be distributable to the individuals."

In conclusion, that court held:

> "This legislation clearly indicates in our opinion, that Congress intended to retain control of the surplus lands and funds of the Cherokee tribe until such time as the enrollment of members should be complete, and until the final dissolution of the tribal government. We think it had the undoubted right to so retain control, not only of the Indians themselves as is provided by the said acts, which limit their right to dispose of or lease their several parcels of land after allotment to them, but of the tribal government, the roll of members, and of the undivided property of the community or tribe; and that Congress did not, by said act of July 1, 1902, intend to constitute the complainants and those they represent, the exclusive owners, as tenants in common, of the undivided community or tribal property."

The Court of Claims in the Sac and Fox Indian case (45 C. Cl., 287), held:

> "Furthermore, the Supreme Court has decided that there is no vested interest in the unallotted tribal lands and undistributed tribal funds. As was said in the case of Stephens *vs.* The Cherokee Nation (174 U. S., 445), '* * * the lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.' The same principle was laid down in Wallace *vs.* Adams (143 Fed. R., 716), which was subsequently affirmed by the Supreme Court (204 U. S., 415)."

This was affirmed by this court on April 24, 1911 (220 U. S., 481).

The Court of Appeals, District of Columbia, in the Goldsby case (30 D. C. App., 177), held: "It is quite true that individual members of the Indian tribes had no vested rights in the lands by virtue of enrollment only," and this opinion was affirmed by the Supreme Court (211 U. S., 249).

Ligon *vs.* Johnston, 164 Fed. R., 670.
Hayes *vs.* Barringer, 168 Fed. R., 221.
Cherokee Nation *vs.* Hitchcock, 187 U. S., 294.
Conley *vs.* Ballinger, 216 U. S., 84.
Fleming *vs.* McCurtain, 215 U. S., 415.

Every court that has considered the question has held:

1. That prior to the allotment act the title to the lands and funds was in the tribe and not in the individual.

2. That the act of July 1, 1902, did not change the title to the surplus or unallotted lands and funds—they remained tribal.

3. That the enrolled citizens had no vested interest in and to the surplus lands and undistributed funds of the tribe.

Nor did any title vest in the individual members of the tribe in the lands and funds under the act of July 1, 1902.

The petitioners take the position that the Cherokee Nation had acquired a fee-simple title to its lands under the patent of December 31, 1838; that the tribe was dissolved by the act of July 1, 1902, and vested in the members of the tribe enrolled as of September 1, 1902, title to the tribal lands and funds, although unallotted or undistributed, which could not be disturbed by subsequent legislation. This position of the appellants utterly ignores the fact that on June 28, 1898, an allotment act was passed, under which a roll was begun on May 11, 1900, which, under the subsequent act of March 3, 1901 (31 Stat., p. 1073), authorized the Secretary of the Interior to fix the time for the closing of the Cherokee roll, which he did, and said roll was to be made as of date July 1, 1902. The making of this roll was continued under the amendatory act of July 1, 1902, *supra*, and was not completed until March 4, 1907, nearly a year after the acts of April 26, 1906, and June 21, 1906, were passed.

The act of July 1, 1902, was entitled to no greater weight than the acts of June 28, 1898, and March 3, 1901. As was said by the court in the Cherokee Intermarried White Cases (203 U. S., 76):

> "Counsel for claimants speak of the act of 1902 as a 'treaty,' but it is only an act of Congress, and can have no greater effect."

Further the court said:

> "It is a singular commentary on the situation that the majority of the native Cherokees voted against its acceptance, which was carried by the vote of the whites."

Mr. Justice Stafford in his opinion in this case held that the act of 1902 was no more than an act of Congress, and that the provision submitting it to the Cherokee people for ratification was unnecessary:

> "The act of 1902 provided for an allotment of lands of the Cherokee Nation among the individual members of the nation. The act was passed in response to a request from the nation. The stipulation in the treaty of 1866 had provided that upon such request the United States should at its own expense make such an allotment. But a request was not necessary. Congress could have made the allotment without any request; and could have ended the political existence of the Cherokee Nation with or without its consent. It chose to act upon the request, but its power was not limited thereby. The act of 1902 provided that it should not be of any validity until it had been ratified at an election by the legal voters of the Cherokee Nation. Section 74. But this was a provision that might have been omitted without affecting the constitutionality of the act. The act was ratified by the Cherokee Nation in accordance with this provision; but the constitutionality of the act is to be tested without reference to this unnecessary provision."

Therefore, if the contention of the petitioners is correct, they acquired vested rights under the act of June 28, 1898, which were afterwards divested by the act of July 1, 1902; and if the rights of individual members could have been properly interfered with by the act of 1902, it is difficult

to understand why they could not be still further interfered with by the acts of April 26, 1906, and June 21, 1906. To make ourselves perfectly clear, the act of March 3, 1901 (31 Stat., 1073), gave the Secretary of the Interior authority to fix the closing of the tribal roll begun under the act of 1898, and he fixed the date as of July 1, 1902. Afterwards, by the act of July 1, 1902, *supra,* Congress itself fixed the date of the closing of the roll as of September 1, 1902, and provided that none born after that date should participate in the distribution of the tribal lands and funds, thereby permitting the enrollment of children born between July 1, 1902, and September 1, 1902. If this could be legally done it is difficult to see why those born between September 1, 1902, and March 4, 1906, were not legally admitted to enrollment by the acts of April 26, 1906, and June 21, 1906. This was a remedial provision, for it is conceded that if the act of July 1, 1902, had not fixed the closing of the roll as of September 1, 1902, all of the children to whose enrollment the appellants have objected in this case, and even those born after March 4, 1906, would have participated in the distribution of the Cherokee communal property at the final settlement. Not only this, but the closing of the roll on September 1, 1902, would have deprived the families of those Cherokees who were entitled to be enrolled on September 1, 1902, but who had died between that date and the ratification of the act on August 7, 1902.

As a matter of law, however, the title to the tribal lands was not changed in any respect by the act of July 1, 1902, as clearly shown by sections 58 and 59 of that act, which provided that the signature of the Principal Chief to the patent shall convey the interest of the nation, and the approval of the Secretary of the Interior shall serve as a relinquishment of the interest of the United States in the allotted lands.

The attorneys for the appellants have in effect contended, as it appears to us with more earnestness than reason, that

the interest of the individual members of the nation in the tribal lands was that of tenants in common. This position has been rendered untenable by the decision in the case of *Fleming et al. vs. McCurtain et al.*, 215 U. S., 56, where it was held to be a communal interest.

The Court of Claims in the case of Muskrat and Dick, *supra*, said:

> "While it was within the power of Congress, by the act of July 1, 1902, to fix the date for enrollment prior to the time therein fixed for the termination of the tribal government, no sufficient reason, other than the act itself, can be urged therefor on either legal or equitable grounds, and this was doubtless the view of Congress when, by the acts of April and June, 1906, the time of enrollment was extended to the date fixed for the termination of the tribal government. This act is in harmony with the act of June 28, 1898 (30 Stat. L., 495, 513), respecting the Choctaw and Chickasaw nations, wherein it is provided that: 'It is further agreed that the Choctaws and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States.'
>
> "True, the acts of April and June, 1906, were passed after the date fixed for the termination of the tribal government, but their operation respecting those to be enrolled was limited to March 4, 1906. Hence but for these acts children of enrolled Cherokee parents under the act of July 1, 1902, though living during the existence of the tribal government, would have been denied their rights as communal owners in the common property; and it is no answer to say that the communal rights of the members of the nation in the lands were severed by the act of July 1, 1902, and thereby became vested as of the date of enrollment thereunder, for the tribal

> government was to continue until March 4, 1906, of which the allottees were bound to take notice; and so long as the tribal government existed no right as between themselves or as against the United States could vest in severalty in the common or unallotted property. In other words, nothing short of actual allotment in severalty, as provided by law, will give the individual members of the nation vested rights as against the United States. The act does not seek to divert the lands from the communal owners and give them to strangers, but merely extends the time for allotment so as to include and equalize allotments to all those living on the date fixed for the termination of the tribal government."

Mr. Justice Stafford in his opinion in this case repeatedly held that the act of 1902 did not provide for individualizing the surplus or unalloted lands. At the bottom of page 8 of his opinion (see Appendix A) he said:

> "The question here relates solely to the title to the surplus acres, as to which there is no provision for allotment under the act of 1902, and to the funds that should remain after due administration thereof by the Secretary of the Interior."

And further on he said:

> "The title still rests in the Cherokee Nation, whose existence was carefully and purposely continued until such time as an actual division should be made."

Cherokee tribal lands and funds sufficient for all allotments.

Mr. Justice Stafford in his opinion frequently made reference to the fact that there is a large amount of surplus acres and tribal funds remaining after the allotments have been

completed to those enrolled as of date September 1, 1902. It is conceded that there remains sufficient lands and funds to equalize the allotments of all persons enrolled under the acts of July 1, 1902, and April 26, 1906.

The opinion of the Court of Appeals contains the following statement taken from the sixth paragraph of plaintiffs' amended bill:

> They further aver that after the said allotment is made to the 36,000 persons enrolled, and entitled thereto, there will be about 440,000 acres of such average lands left as surplus, and about $2,500,000 in money in the Treasury, belonging to the said allottees.

There have been 5,610 children, born between September 1, 1902, and March 4, 1906, enrolled under the act of April 26, 1906, *supra*, as amended by the act of June 21, 1906, *supra*. There are 4,000 allotments of tribal lands still remaining unallotted and over two and one-half millions of dollars of tribal funds in the Treasury of the United States, sufficient lands and funds for the allotment of all of these children without interfering with the allotments made under the act of July 1, 1902, to persons who were living on September 1, 1902.

All of these after-born chidren who cannot receive allotments of land are entitled to receive twice $325.60 or $651.20 under section 2 of the act of April 26, 1906 (34 Stat., 137).

It cannot, therefore, be successfully claimed that any lands which have already been allotted will be interfered with if these children are adjudged to be entitled to remain upon the rolls, and especially so in view of section 60, act of July 1, 1902, *supra*, where every allottee who received a patent assented to the allotment and conveyance of the tribal lands, as provided by the act, and relinquished his right, title and interest to the same, except the proceeds of certain lands

reserved from allotment. The lands reserved from allotment were such as were reserved for schools and other public purposes by section 24 of the same act.

The Court of Claims in its opinion said:

> "After said allotments had been made there remained unallotted lands sufficient for about 3,800 such average allotments, which unallotted lands, together with the undistributed funds in the United States Treasury, to the credit of the Cherokee Nation—exceeding $2,000,000—are ample, as provided by the act of April 26, 1906, as amended to equalize the allotments of all persons on the final or extended roll of Cherokee citizens as of March 4, 1906."

It will be seen therefore, that our contention in this respect is conceded by appellants and upheld by the court, and that no lands actually allotted to any individual were affected by the acts of Congress complained of in this action.

The provision of the acts of April 26, 1906 (34 Stat., 137), and June 21, 1906 (34 Stat., 341, 342), for the enrollment of children born after September 1, 1902, was an agreement with the Cherokee Nation.

The provision incorporated into the act of April 26, 1906, as amended by the act of June 21, 1906, for the enrollment of minor children was really *an agreement* with the tribes through their accredited representatives. The Cherokee Commission was appointed by authority of an act of the Cherokee Council; was accompanied by the Principal Chief, W. C. Rogers, and was instructed by joint resolution to request the enrollment of minor children born on or prior to March 4, 1906, and living upon that date, and this commission followed these instructions and requested the enrollment of said minor children. While the act of April 26, 1906, in so far as it provides for the enrollment of minor

children, may have no greater effect than an act of Congress, it was really an agreement, and this act should be interpreted in the light of all the circumstances attending its enactment.

Not only was it the sense of the Cherokee National Council that the children born between September 1, 1902, and March 4, 1906, should be enrolled, but the Cherokee Nation through its authorized representatives requested both Congress and the Department of the Interior to insert the provision in question, and it was done at their request, and at the request of the Chickasaw Nation, as will be shown by reference to the findings of fact in the case of *Muskrat and Dick vs. The United States* (33 C. Cls., 137), and House Document No. 455, 59th Congress, First Session, appended for convenient reference hereto, marked Exhibit "B." This document is a letter from the Secretary of the Interior transmitting a memorial from the Chickasaw legislature memorializing Congress to enroll the minor children of that nation born up to and living March 4, 1906.

In the case of *Wiggan vs. Conolly* (163 U. S., 56) the court sustained a second agreement extending the restrictive period upon the alienation of lands allotted and patented to minors, holding:

> "The land and the allottee were both still under the charge and care of the nation and the tribe, and *they could agree for still further protection, a protection which no individual was at liberty to challenge.*"

The court held to the same effect in the case of *Conley vs. Ballinger, supra,* where the petitioner was seeking to maintain a similar suit, as follows:

> But the right of the Wyandottes was in them only as a tribe or nation. The right excepted was a right of the tribe.

In this case the tribe and the Government have agreed to an extension of the time within which these children born since September 1, 1902, may be enrolled before the dissolution of the tribal government, and we earnestly contend, in the language of the Supreme Court, that "no individual was at liberty to challenge" this agreement as incorporated in the act of April 26, 1906, *supra.*

Petitioners have no right to maintain this action for the reason that the title to the unallotted lands remained in the tribe and is therefore "a right of the tribe."

This question was definitely settled in the case of *Blackfeather vs. The United States* (190 U. S., 368), appealed from the Court of Claims (37 C. Cls., 233), wherein the court, adopting the language of the Court of Claims, held:

> "The plaintiff, by the allegations of the petition has asserted an individual obligation existing between the United States and each of the claimants, and, in order to recover, it must appear that such a relation exists.
>
> "The United States, as the guardian of the Indians, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts, either expressed or implied, compacts or treaties with individual Indians so as to embrace within the purview of such contracts or undertaking the personal rights of individual Indians."

If we are right in our contention that the unallotted lands and undistributed moneys are yet tribal, then it follows that no suit can be brought by individuals, but it must be brought on behalf of the tribe, and this court has decided in the Marchie Tiger case (221 U. S., 286), and in the Bell Frost case (216 U. S., 240), that the tribe was still in existence.

Mr. Justice Stafford in his opinion sustained our contention in the following terse language:

"The individual members of the nation had no property rights therein that could be enforced by any legal proceedings. Cherokee Trust Funds, 117 U. S., 188; Stephens *vs.* Cherokee Nation, 174 U. S., 445; Cherokee Nation *vs.* Hitchcock, 187 U. S., 294; Cherokee Natian *vs. Journeycake,* 155 U. S., 196. The United States in such circumstances deals only with the tribe or nation, not with the individual Indians as vested with property rights. Blackfeather *vs.* U. S., 190 U. S., 368; Cherokee Trust Fund, 117 U. S., 288; Fleming *vs.* McCurtain, 215 U. S., 56. The power of the United States to deal with the tribe or nation in respect of its tribal property cannot be questioned in the courts, the tribe or nation having no right to sue the United States without its consent."

The Court of Claims in its opinion held:

As set forth in Findings XI, XII, and XIII, said acts of April and June, 1906, were passed by Congress at the request and on the petition therefor of the representatives of the Cherokee Nation appointed therefor with the approval of the President of the United States (31 Stat. L., 1077), and, therefore, so far as the nation could act in behalf of its citizens in that respect their consent, if that were necessary, was given to said acts (44 C. Cls., 137).

Petitioners have heretofore contended that they did not object to the provisions of the act of April 26, 1906, *supra,* standing alone, because, as they contended, it was not intended to apply to the Cherokee tribe, and insisted that they objected only to the amendatory act of June 21, 1906. They contend that the following proviso, added to said section 2 of the act of April 26, 1906, was intended to make it inapplicable to the Cherokee tribe:

> "*Provided further,* That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States."

They insist that an agreement had been made with the Cherokee tribe, referring to the act of July 1, 1902, *supra*. They overlook the fact, however, that a similar provision had been incorporated into acts or agreements affecting all of the other Five Civilized Tribes. The proviso referred to in said section 2 was intended to refer to the provision added to section 1 of the act permitting the Secretary of the Interior to enroll upon the tribal rolls all persons whose applications were made prior to December 1, 1905, and was intended to refer to the application of adults and not to minor children. This is clearly shown by investigating the legislative history of the act of April 26, 1906. Congress by the act approved March 3, 1905 (33 Stat., 1060), provided for the enrollment of the minor children in the Chickasaw, Choctaw, Creek and Seminole Nations born prior to and living on March 4, 1905. When the act of April 26, 1906, was introduced into the House of Representatives, section 2 of the act only provided for the enrollment of the minor children of the enrolled parents of the members of the Five Civilized Tribes who were living on March 4, 1905, just as the act above referred to approved March 3, 1905 (32 Stat., 1060), had already provided for the enrollment of all minor children of the other Five Civilized Tribes, except the Cherokees. Therefore, it could not have been intended that this act as introduced into the House of Representatives was to exclude the minor children of Cherokees. This bill was introduced as H. R. 5976, and volume 40, part 2, page 1242, contains a discussion of the bill, and shows that it passed the House of Representatives with the date March 4, 1905, instead of March 4, 1906, and it was finally amended in the Senate. Why would it have been necessary to have inserted

this amendment in the Senate if the children born subsequent to September 1, 1902, were not to be enrolled? Mr. Curtis, on page 1242 of the above volume of the Congressional Record, said:

> "The Commissioner of Indian affairs, the Secretary of the Interior and the Dawes Commission and the committee appointed by the Secretary of the Interior have carefully gone over the bill; in fact, prepared most of its provisions. It can be called a 'Department' bill."
>
> See H. R. Report No. 2347, 59th Cong., 1st Sess., Amendment No. 4.

Certainly no one will contend that section 2 of the act of April 26, 1906, would have been prepared by the representatives of the Department of the Interior and intended to apply to the other four nations of the Five Civilized Tribes and not to the Cherokees, when Congress the year before, by the act of March 3, 1905, *supra,* had already provided for the enrollment of the minor children in those tribes.

The legislative history confirms the statement of the Court of Claims in Finding XIII, that said section 2 of the act of April 26, 1906, *was passed at the request and upon the recommendation of the accredited representatives of the Cherokee Nation.* Fearing that there might be some ambiguity when the bill was finally engrossed and approved, the amendatory provision to free it of any doubt was incorporated into the Indian appropriation bill which was then pending, and was approved June 21, 1906.

Explaining this amendment the Senate Committee on Indian Affairs (see Sen. Rep. No. 2561, 59th Cong., 1st Sess., p. 27, dated April 13, 1906), through Senator Clapp, said:

> "Application for Enrollment.—It was found in conference on the Five Civilized Tribes bill that the proviso herein inserted was in conflict with the pro-

visions of section 2 of that bill extending the time for enrollment of children, but the conferees were unable to adjust it to the balance of the section, not being the subject of conference, consequently it was inserted here."

It will be observed, therefore, that this amendment repealing the above proviso to section 2 of the act of April 26, 1906, was reported to the Senate on April 13, 1906, and the Congressional Record (Vol. 40, Pt. 2, p. 5305) shows that this amendment passed the Senate on April 16, 1906, or ten days before said act of April 26, 1906, became a law. This shows that it was clearly the intention of Congress to provide for the enrollment of the minor children in all four of the Five Civilized Tribes.

The above record shows that the provision as originally drafted, while it embraced the other four nations of the Five Civilized Tribes, was intended only for the benefit of the minor Cherokee children. The amendment in the Senate changing the date from March 4, 1905, to March 4, 1906, provided for the enrollment of the minor children of the other tribes, the Seminoles excepted, as well as the Cherokee tribe up to March 4, 1906. *The minor children in all of the other Five Civilized Tribes, except in the Seminole nation, who were living on March 4, 1906, have been enrolled and allotments made to them.*

Change of position by appellants.

Appellants, for the first time, now contend that section 2 of the act of April 26, 1906 (34 Stat., 137), as amended by the act of June 21, 1906 (34 Stat., 342), properly construed, does not authorize the Secretary of the Interior to enroll minor children born subsequent to September 1, 1902, and up to and living on March 4, 1906, but that it should be construed as directing the enrollment of minor children born prior to September 1, 1902, and in the event that the

court should hold against them, then that the provision of the act of April 26, 1906, as amended by the act of June 21, 1906, is unconstitutional for the reason that said provision deprives appellants of vested property rights without due process of law. No such construction has ever been contended for by appellants before.

On January 23, 1907, appellants filed a bill in the Supreme Court of the District of Columbia attacking the constitutionality of section 2 of the act of April 26, 1906, *supra*, as amended by the act of June 21, 1906, *supra*, but—

(1) They did not insist that the acts properly construed would prevent the minor Cherokee children born up to and living on March 4, 1906, from being enrolled.

(2) Upon petition of the appellants, as shown by Senate Document No. 234, 59th Congress, 2nd Session, being a memorial of the Cherokee Indians, signed by Frank J. Boudinot and Levi B. Gritts, two of the appellants herein, attacking the constitutionality of the above provisions requiring the enrollment of minor children, an amendment was added to the Indian appropriation bill approved March 1, 1907 (34 Stat., 1015), authorizing appellants to institute their suit in the Court of Claims, with the right of appeal to the Supreme Court, "to determine the validity of any acts of Congress passed since the act of July 1, 1902, so far as the said acts, or any of them, attempt * * * to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, as provided in the said act of July 1, 1902." That this amendment was incorporated upon the petition of appellants is further shown by a reference to pages 37 to 46 Senate Report No. 5698, 59th Cong., 2d Sess., dated January 30, 1907, being a report on the Indian appropriation bill then pending, which afterwards became the act of March 1, 1907.

The statement of the managers on the part of the House attached to conference report on the Indian appropriation

bill which afterwards became the act of March 1, 1907, *supra,* said:

> "The effect of the amendment adopted is to permit a test case to be brought to determine the constitutionality of the act adding to the rolls of the Cherokee Nation *children born since the act of 1902.*" (Italics ours.)

It will be noticed that the validity of the acts were to be tested, and no fault was found with the construction placed upon them by the Department.

(3) The decision of the Court of Claims (44 C. Cls., 137), at page 151 recites the contention of appellants as follows:

> "The claimants' contention is that by virtue of the citizenship of the Cherokees under the act of March 3, 1901, and the allotment act of July 1, 1902, those enrolled under said act as of September 1, 1902, thereby acquired vested rights in and to all the common property of the Cherokee Nation, and having thereby acquired such vested rights it was not within the power of Congress to divest them thereof; that section 2 of said act of April 26, 1906, as amended, seeks to take the property of the claimants, citizens of the United States, without due process of law, and is therefore in violation of the fifth amendment to the Constitution of the United States."

They found no fault with the construction of the Department when they argued the case before the Court of Claims.

(4) The decision of the Supreme Court in the case of Muskrat and Dick *vs.* The United States (219 U. S., 346), appealed from the Court of Claims, shows that only the constitutional validity of the acts of Congress of April 26, 1906, as amended by the act of June 21, 1906, was called in question by the appellants.

(5) Exhibit "B" to plaintiffs' bill (Record, p. —), shows that the construction by the Keetoonah Society, under whose alleged employment this bill was filed, was to the contrary:

> "Whereas, by acts of the Congress of the United States, approved on the 26th day of April, 1906, and June 21st, 1906, respectively, several millions of dollars' worth of lands and moneys, belonging to recognized citizens of the Cherokee Nation, are directed to be taken from the property owners thereof, without their consent, and distributed among about 5,500 minor children, described in said acts of Congress. * * *"

(6) The contention of the appellants before Mr. Justice Stafford was not that the acts were erroneously construed, but as stated by Mr. Justice Stafford in his opinion:

> "The contention of the plaintiffs is that these provisions are unconstitutional and void, as depriving them of vested property rights under the act of 1902."

In reply to the new position taken by appellants as to the construction that should be placed upon the above provisions, the attention of the court is invited:

(1) to the language of section 2 of the act of April 26, 1906, *supra*, which in unambiguous language provides:

> "That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living on March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of their mother, and allotments shall be made to children so enrolled."

It will be noticed that the children were to be *living* on March 4, 1906, and *"allotments shall be made to children so enrolled."* In other words, they were to be enrolled for the purpose of allotment. They were to be members of the tribe the same as those previously enrolled.

(2) Mr. Curtis on page 1242 of the Congressional Record, vol. 40, part 2, said with reference to the bill of which section 2 under consideration was a part:

> "The Commissioner of Indian Affairs, the Secretary of the Interior, and the Dawes Commission, and the committee appointed by the Secretary of the Interior have carefully gone over the bill; in fact prepared most of its provisions. It can be called a 'Department' bill."

In the case of United States *vs.* Moore (95 U. S., 763), the court said:

> "The construction given to a statute by those charged with the duty of executing it * * * ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

(3) We have already shown herein that section 2 of the act of April 26, 1906, *supra*, as prepared by the Department, introduced into and passed the House, it provided for the enrollment of minor children living on March 4, 1905. (See Congressional Record, vol. 40, part 2, 59th Cong., 1st sess., p. 1247.) The bill was amended in the Senate by striking out the Seminole tribe and changing 1905 to 1906, and this was amendment No. 4. The statement of the managers on the part of the House, J. S. Sherman, Charles Curtis, and J. H. Stephens, attached to the conference report upon the bill of which section 2 was a part (H. R. 5976), explaining amendment No. 4, states:

"Amendment No. 4 requires the enrollment of children born up to March 4, 1906." (See report No. 2347, 59th Cong., 1st sess.)

It would seem that further argument was unnecessary.

(4) A full history of the action of the representatives of the Cherokee Nation, as instructed by the Cherokee National Council, in petitioning for the enrollment of minor children born up to March 4, 1906, will be found in the decision of the Court of Claims in the case of Muskrat *et al. vs.* The United States (44 C. Cls., 137).

(5) The Chickasaw Nation also memorialized Congress for the enrollment and allotment of land to the minor children of citizens by blood of the Choctaw and Chickasaw Nations born since March 4, 1905, and up to and including March 4, 1906, as shown by a memorial submitted to Congress in a letter from the Secretary of the Interior on January 31, 1906. (See Document No. 455, H. R., 59th Cong., 1st sess., Appendix B.)

Attention is invited to the letter of the Secretary of the Interior, and to the letter of the Commissioner of Indian Affairs for the reason that both refer to the pending bill H. R. 5976, which afterwards became the act of April 26, 1906, and clearly shows that their construction of the bill which if enacted would provide for the enrollment of minor children born up to March 4, 1905, and that allotments should be made to children so enrolled. The bill was amended in the Senate so as to bring the date up to March 4, 1906. This document for easy reference is attached hereto as Appendix "B."

(6) The Supreme Court in the case of Muskrat and Dick *vs.* The United States, appealed from the Court of Claims (219 U. S., 346), in construing the effect of the acts passed subsequent to July 1, 1902, being section 2 of the act of April 26, 1906, as amended, held:

> "The acts subsequent to that of July 1, 1902, have the effect to increase the number of citizens entitled to participate in the division of the Cherokee lands and funds, by permitting the enrollment of children who were minors living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe, or had applications pending for that purpose."

ACT OF CHEROKEE COUNCIL APPOINTING COMMISSION APPROVED.

Counsel for appellants, in their brief, insist that the act under which the Cherokee Commission was appointed was not approved by the President of the United States, and therefore the commission was illegal. The attention of the court is invited to Finding XI of the Court of Claims, wherein it is found as a fact that the act of the Cherokee Council approved by the Principal Chief on September 28, 1905, under which the Cherokee Commission was appointed, was approved by the President of the United States November 7, 1905, and this commission was "appointed in conformity with section 3, article 6, of the Constitution of the Cherokee Nation," and was "authorized to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs and all other relations with the United States of America, except as to all the matters now pending in the courts of the United States."

Said section 3, article 6, of the Cherokee Constitution, provides:

> When the National Council shall determine the expediency of appointing delegates or other public agents for the purpose of transacting business with the Government of the United States, the Principal Chief shall recommend and, by the advice and consent of the national committee, appoint and commission such delegates or public agents accordingly.

The name of the upper branch of the Cherokee Council was changed from "national committee" to "senate" by section 1 of the amendments to article 3, Cherokee Constitution, adopted November 26, 1866, which reads as follows:

> The upper house of the National Council, known as the national committee, shall be hereafter known and styled "the senate of the Cherokee Nation."

Finding XIII shows that this commission, accompanied by the Principal Chief and National Attorney for the Cherokee Nation, "came on to Washington on November 21, 1905, *and conferred with the representatives of the Interior Department, the Commissioner of Indian Affairs and the House and Senate Committees on Indian Affairs, and at the request and recommendation of said Cherokee Commission, section 2 of the act of April 26, 1906,*" was passed, the joint resolution of the Cherokee National Council, instructing the commission in detail, as set forth in Finding XII.

These findings of the Court of Claims conclusively show that the Cherokee Commission was legally appointed and had the authority to represent the Cherokee tribe. The Court of Claims was fully justified in its fifth conclusion of law that:

> Section 2 of the act of April 26, as amended by the act of June 21, 1906, was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation, as instructed by the National Council of the Cherokee Nation, with the approval of the President of the United States, as set forth in Findings XI, XII, and XIII.

Counsel for appellants have insisted that the joint resolution instructing the commission was not binding because it was not approved by the President of the United States. The act of the Cherokee Council appointing the commission was approved, and the Department held that inasmuch as

the joint resolution was only an expression of the sense of the Cherokee people that it did not require executive approval. This is shown from the last line of the letter of the Acting Commissioner of Indian Affairs found in Appendix "B," transmitting the memorial of the Chickasaw legislature requesting the enrollment of minor children in the Chickasaw and Choctaw nations, wherein the commissioner states:

> "The memorial does not seem to require executive action."

The resolution of the Cherokee Council was approved by the President August 17, 1907.

The Power of Congress to Administer upon the Affairs of Dependent Indian Tribes is Plenary.

But if the act of April 26, 1906, *supra*, as amended by the act of June 21, 1906, *supra*, be found by the court not to have the effect of an agreement, we insist that Congress had the power to enact the legislation.

The government changed its policy toward the Indian tribes on March 3, 1871 (16 Stat., 544). Prior to that time treaties were negotiated with them, but a provision was inserted in the act of that date, now section 2079 of the Revised Statutes, declaring the intention of Congress to thereafter abandon its former policy of negotiating treaties and to exercise authority over them by direct legislative enactments. This policy was justified and sustained by the courts upon the theory that the Indians of all tribes were wards of the Government of the United States, and while they were recognized as distinct political communities, yet they were in a condition of pupilage or dependency and subject to the paramount authority of the United States. (*Cherokee Nation vs. Hitchcock*, 187 U. S., 294.)

The court held in the case of *Cherokee Nation vs. Southern Kansas Railway Company* (135 U. S., 641), speaking of the Cherokees, as follows:

> From the beginning of the government to the present they have been treated as "wards of the nation," "in a state of pupilage," "dependent political communities," holding such relations to the General Government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation vs. Georgia* (5 Peters, 1, 17), "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.

And the court further held in that case:

> The Cherokee Nation is not sovereign in the sense that the United States or a State is sovereign, but is now, as heretofore, a dependent political community *subject to the paramount authority of the United States.* (*Stephens vs. Cherokee Nation*, 174 U. S., 445; *Worcester vs. Georgia*, 6 Peters, 515; *Choctaw Nation vs. United States*, 119 U. S., 1; *Jones vs. Meehan*, 175 U. S., 1; *United States vs. Kagama*, 118 U. S., 375; *United States vs. Rickert*, 188 U. S., 432; *Lone Wolf vs. Hitchcock*, 187 U. S., 553; *Roff vs. Burney*, 168 U. S., 218.)

Because of the fact that all Indian tribes or nations are regarded as dependent communities or wards of the Government, the courts are reluctant, particularly since Congress, in 1871, announced its change of policy in dealing with the Indians by direct legislation, to interfere with their control by Congress. In the case of *Cherokee Nation vs. Hitchcock*

(187 U. S., 294) the court, speaking through Mr. Justice White, on December 1, 1902, said:

> "The plenary power or control by Congress over the Indian tribes and its undoubted power to legislate as it has done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed,"

referring to the case of *Stephens vs. Cherokee Nation* (174 U. S., 445). The court closes the opinion with the following sweeping language:

> "The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise *is a question within the province of the legislative branch to determine, and is not one for the courts.*"

In the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553), decided by the court as late as January 5, 1903, it was held:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, *and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government.* Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties and of course a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into upon its behalf. But, as with treaties made with foreign nations (Chinese Exclusion case, 130 U. S., 581, 600), the legislative power might pass laws in conflict with treaties made with the Indians.

In the above case Congress, openly in violation of existing treaties with the Indians, by direct legislation provided in detail for the allotment of the lands of the Indians, the sale of their surplus lands, and the disposition of the proceeds derived therefrom, upon the theory that they were wards of the Government. In concluding its opinion in that case the court used the following language, indicating that there was no limit to the plenary power of Congress over Indian tribes, and that the courts would not interfere with the discretion of Congress:

> We must presume that Congress acted in perfect good faith in the dealing with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, *as Congress possesses full power in the matter, the judiciary cannot question or inquire into the motives which prompted this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.* The legislation in question was constitutional and the demurrer to the bill was therefore rightly sustained. (*Stephens vs. Cherokee Nation,* 174 U. S., 445.)

The same principle has been repeatedly enunciated by the court. *In re Heff* (197 U. S., 488) the court, after discussing the relation of guardian and ward between the United States and Indian tribes and the plenary power of Congress over them, citing numerous authorities, held:

> *It is not within the power of the courts to overrule the judgment of Congress.* It is true there may be a presumption that no radical departure is intended, and courts may easily insist that the purpose of Congress be made clear by its legislation, *but when that purpose is made clear the question is at an end.*

In the case of *United States vs. Rickert* (188 U. S., 432), commenting upon the exclusive authority of Congress over Indians, the court, through Mr. Justice Harlan, said:

> It is for the legislative branch of the Government to say when these Indians shall cease to be dependent or assume the responsibility attaching to citizenship. That is a political question which the courts may not determine. (*Wallace vs. Adams*, 204 U. S., 415.)

In the case of *United States vs. Rogers* (4 How., 567) the court held:

> The country in which the crime is charged to have been committed is a part of the territory of the United States and not within the limits of any particular State. It is true it is occupied by the Cherokee Indians. But it has been assigned to them by the United States as a place of domicile for the tribe and *they hold with the assent of the United States and under their authority.* (*United States vs. Kagama*, 118 U. S., 375; *Talton vs. Mayes*, 163 U. S., 376.)

The latest decision of the Supreme Court was in the case of *Starr vs. Campbell*, decided February 24, 1908, wherein the court said:

> It must at the outset be kept in mind that a policy of control over the Indians has always been observed by the Government. The many exercises of this policy which have been sustained by this court we need not stop to comment on.

The court in the case of *Thomas vs. Gay* (169 U. S., 264) held:

> *The unlimited power of Congress* to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations may be conceded.

The Court of Claims in its opinion, after reviewing a number of authorities, held:

> But independent of such treaties and their acknowledgment, the Cherokees and other Indians have been, since our Government was organized, subject to the paramount authority of the United States, exercised by Congress; and they and the territory occupied by them being within the geographical limits of the United States have at all times been subject to the laws of Congress enacted for their protection as well as for the protection of the people with whom they come in contact (*Worcester vs. Georgia*, 6 Pet., 515). In other words, the United States, had they so elected, might from the first, without the consent of the Indians, have controlled them and their tribal property by acts of Congress instead of by treaties (*United States vs. Kagama*, 118 U. S., 375, 379). And the purpose to control them by acts of Congress instead of by treaties was indicated by the act of March 3, 1871 (now Rev. Stat., sec. 2079).
>
> Referring to that section the court, in the *Matter of Heff* (197 U. S., 488, 498), said: "From that time on the Indian tribes and the individual members thereof have been subject to the direct legislation of Congress, which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life."
>
> Further, in commenting on the power of Congress in that same case, the court, quoting from the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553, 565), said: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."

> And after quoting numerous authorities in support of that holding and other authorities looking to the protection of the Indians, the court said: "But none of the decisions affirming the protection of the Indians questioned the full power of the Government to legislate in respect to them."
>
> Furthermore, in the case of the *Cherokee Nation vs. Hitchcock* (187 U. S., 294) the court held, in effect, that Congress, by the act of June 28, 1898, "practically assumed the full control over the Cherokees as well as the other nations constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property." (See also *Delaware Indians vs. Cherokee Nation,* 193 U. S., 127.)
>
> To the same effect also is the case of *Wallace vs. Adams* (204 U. S., 415) respecting citizenship in the Indian tribes.

The above authorities abundantly sustain the sixth conclusion of law held by the Court of Claims:

> The Congress have plenary power to guard, protect, and administer upon the tribal property of the Cherokee Nation, and that power is political, and is for the legislative branch and not for the courts to determine.

Attention here is again invited to the fact that no provision was made in the act of July 1, 1902, *supra,* for the disposition of the unallotted lands belonging to the Cherokee Nation, but that is found in sections 16 and 17 of the act of April 26, 1906. Petitioners, however, conceded this conclusion of law in their brief in the Court of Claims in the following language:

> "Having plenary power over tribal property, as numerous decisions declare, it could provide for its distribution if the Indians were at the time in tribal relations (*Lone Wolf vs. U. S.*, 187 U. S., 553, 565)."

In the case of *Ligon vs. Johnston, supra,* decided September 30, 1908, the Circuit Court of Appeals decided, upon the authority of numerous cases therein cited, that Congress had plenary power to enact all necessary legislation to determine the membership of the tribe and for the disposition of the lands and funds of the tribe.

Supported by the above authorities, Mr. Justice Stafford held:

> "Plenary power over the tribes and their property has been exercised by Congress from the beginning, restrained only by its sense of moral obligation."

And the Court of Appeals, affirming the above opinion said:

> "We think it (Congress) had the undoubted right to so retain control, not only of the Indians themselves (as provided by the said acts, which limit their right to dispose of or lease their several parcels of land after allotment to them), but of the tribal government, the roll of members, and of the undivided property of the community or tribe."

Since the decision of this Court in the Marchie Tiger case (221 U. S., 286), other citations of authorities would seem unnecessary. The court in that case quotes at length from former decisions in other cases, and upon this point concludes with the following quotation from its former opinion in the case of Lone Wolf *vs.* Hitchcock (187 U. S., 565):

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a

political one, not subject to be controlled by the judicial department of the Government."

Character of Title Immaterial.

Nor does the difference in the character of title held by the Indian tribes to their lands in any manner or degree change, alter, or diminish the power of Congress over them or their tribal property. This power is the same in all cases—*plenary.*

Mr. Justice Stafford in his opinion in this case said:

> Much was said in argument on behalf of the plaintiffs of the peculiar title by which the Cherokee Nation held its lands, and it was argued that its title was better than that of other Indian tribes in view of the history of the acquisition of the title and the terms of the treaties and acts of Congress relating thereto. But no matter what the title was which the United States had bestowed upon the Cherokee Nation in its political capacity, that title was not one that could be made the basis of an action in the courts against the United States or that could afford any standing ground upon which to contest the validity of an act of Congress dealing with the title. Thus much is clear from the cases already cited.

This same question was pressed with great vigor on behalf of the appellee before this court in the Marchie Tiger case, *supra.* Counsel for the Western Investment Company insisted that because of the character of the title by which the Creek Tribe of Indians held their lands that it conditioned the power of the Government over them and their tribal property. This court, notwithstanding the contention of counsel on behalf of appellee, fully sustained the plenary control by Congress over the Creek Tribe of Indians and their tribal property.

Whether the fee title to the land is in the United States, as is the case with most Indian land, and held in trust for the Indians, or whether it had been allotted, as was the case in *United States vs. Rickert* (188 U. S., 432) and the case of the Kansas Indians (5 Wall., 737), or whether the fee title had been conveyed by patent by the United States to the tribe for the common use and benefit of all, subject only to the possibility of reversion as stipulated in the patent, as in the case of the lands of the Five Civilized Tribes, the courts have made no distinction as to the paramount authority of Congress. (*Cherokee Nation vs. The Southern Kansas Railway Co.*, 135 U. S., 641; *Stephens vs. Cherokee Nation*, 174 U. S., 445; *Cherokee Nation vs. Hitchcock*, 187 U. S., 294; *Choctaw Nation vs. United States*, 119 U. S., 1.)

From an examination of these cases it will be observed that this court, upon the question of the power of Congress over Indian tribes, cites with approval decisions in Indian cases without reference to the character of the title held by the tribe.

The petitioners insist that the difference in the title held by Indian tribes conditions the power of Congress to legislate with respect to their lands.

Mr. Justice White delivered the opinion of the court in the cases of the *Cherokee Nation vs. Hitchcock* (187 U. S., 294) and *Lone Wolf vs. Hitchcock* (187 U. S., 555), and no distinction was made as to the plenary power of Congress over the Indian tribes affected because of the character of the title held by the respective tribes. The Lone Wolf case was decided after and upon the authority of the case of *Cherokee Nation vs. Hitchcock*. The same supreme authority of Congress was upheld by the court in the case of *Stephens vs. The Cherokee Nation* (174 U. S., 445).

Indians Made Citizens of the United States Immaterial.

It is not material that petitioners became citizens of the United States under the act of March 3, 1901 (31 Stat., 1447). The Government of the United States did not thereby lose control over their tribal property. The courts have uniformly held that as long as a nation of Indians was recognized in their tribal capacity by the political department of the United States they were under the supervisory control of Congress. (The Kansas Indians, 5 Wall., 756, 757; *Jones vs. Meehan,* 175 U. S., 1, and cases cited.)

In the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553) the court held:

> That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw vs. United States* (119 U. S., 1, 27) and *Stephens vs. Cherokee Nation* (174 U. S., 445, 483).

The court in passing upon this very question in the case of *United States vs. Rickert* (188 U. S., 432) says:

> It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. *These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question which the courts may not determine.*

In *Farrel vs. United States* (110 Fed. Rep., 942) it was held:

> *It is a settled rule* of the judicial department of the Government, in ascertaining the relations of Indian tribes and their members to the nation, *to follow the action of the legislative and executive departments to which the determination of these questions has been especially intrusted.* (*United States vs. Holliday,* 3 Wall., 407; *U. S. vs. Earl,* 17 Fed. Rep., 75, 78.)

The mere fact that the Indian had taken an allotment and been made a citizen of the United States did not end his status of wardship or limit or end the power of superintendence and protection of the Government of the United States. (*Hitchcock vs. Bigboy,* 22 Appeal Cases D. C., 275; *Farrell vs. United States,* 110 Fed., 942; *Beck vs. Flournoy Co.,* 65 Fed., 30; *Pilgrim vs. Beck,* 69 Fed. Rep., 895; *U. S. vs. Flournoy,* 71 Fed., 576; *U. S. vs. Mullin,* 71 Fed., 682.)

The Circuit Court in the case of *Ross vs. Eels* (56 Fed. Rep., 855) sustained the contention that members of the Puyallup tribe in the State of Washington to whom allotments had been made and who were made citizens of the United States and of the State when the State was admitted into the Union were emancipated from the control of the Government of the United States, but upon appeal the Circuit Court of Appeals (64 Fed. Rep., 417) reversed the decision of the lower court, holding:

> The act of February 8, 1887, which confers citizenship, does not emancipate the Indians from all control or abolish the reservation.

The case was appealed to the Supreme Court, but dismissed (163 U. S., 702.)

But the act of March 3, 1901 (31 Stat., 1447), conferring citizenship upon the Indians in the Indian Territory, was

only an amendment to the act of February 7, 1887, by inserting in said act the words "and every Indian in Indian Territory." There was no intention on the part of Congress to lessen or diminish the authority of the Government of the United States over the other Indian tribes by the act of March 3, 1901. And therefore all decisions cited to the effect that that act did not emancipate the other Indian tribes from governmental supervision are pertinent.

Nor is there anything in the Heff case in conflict with the other authorities cited herein. In that case the court reviewed at length the history of Indian legislation and prior decisions of the court. Construing the Kickapoo treaty in connection with the act of 1887 granting citizenship to Indian allottees, the court held that Congress had the power and by the language did relinquish guardianship over the Indians, and that they were subject to the police regulations of the State. But the court was careful to point out that their being made citizens of the United States and of the State in no way interfered with the control over and protection by Congress of their property rights. And it further held:

> In *construing a statute* affecting the relationship of the Government and the Indians, *it is not within the power of the courts to overrule the judgment of Congress.*

In the case of *McKay vs. Kalyton* (204 U. S., 458) the court, on February 25, 1907, reaffirmed the Rickert case and distinguished between that case and the Heff case.

A review of this entire question by the court is found in the case of *Dick vs. United States,* decided by the Supreme Court of the United States February 24, 1908 (208 U. S., 340-359).

The last expression of the Supreme Court is in the case of *United States vs. Celestine* (215 U. S., 276), where the court reviews many of its previous decisions, and discussed at

length the Heff case, holding that conferring of citizenship upon the members of an Indian tribe did not emancipate them from the control of the Government of the United States, unless the act conferring citizenship so stated in explicit terms.

There could have been no intention to emancipate the Indians of the Five Civilized Tribes from the control of Congress by the act of March 3, 1901, for their citizenship rolls were not completed, none of their lands had been allotted, they were not then within the boundary of any State, and therefore were not subject to the jurisdiction of any State court, but, except for the authority reserved to their tribal councils and officers, were controlled exclusively by acts of Congress and the Department of the Interior, and were under the jurisdiction of the courts of the United States provided for by Congress for that country.

However, the court in the case of *Cherokee Nation vs. Hitchcock* (187 U. S., 294), on December 1, 1902, decided that the act of March 3, 1901, granting citizenship to the Indians in the Indian Territory *did not emancipate* them from the control of the Government of the United States, in the following language:

> There is no question in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, *even though the members of the tribe have been invested with the status of citizenship under recent legislation.*

If the contention of counsel for appellants to the effect that the act of March 3, 1901 (31 Stat., 1447), conferring citizenship upon the Indians completely emancipated them and their property from the guardianship and control of Congress, then every act of Congress, including the acts of

July 1, 1902, *supra,* April 26, 1906, and June 21, 1906, and the subsequent completion of the rolls and the allotment of the lands are invalid. The act of March 3, 1901, *supra,* was as much in force when the act of July 1, 1902, *supra,* was passed as when the acts of April 26, 1906, as amended by the act of June 21, 1906, *supra.*

This court, in the Stephens case (174 U. S., 415), held in effect that Congress by the act of June 28, 1898, had practically assumed full control over the Indian tribes and their property. That decision was rendered May 15, 1899, prior to the passage of the act of March 3, 1901, *supra.* Since the passage of that act the Supreme Court in the case of *Cherokee Nation vs. Hitchcock* (187 U. S., 294), decided December 1, 1902, reaffirmed that decision.

The principal contention on behalf of appellee in the Marchie Tiger case (221 U. S., 286) was that Marchie Tiger had been made a citizen of the United States by the act of March 3, 1901 (31 Stat. at L., 1444, chap. 868), thereby ending the power of Congress to legislate concerning him and his property.

The court in that case reviewed at length numerous authorities and, distinguishing between others cited, held:

> "That Congress has full power to legislate concerning the tribal property of the Indians has been frequently affirmed.
>
> Cherokee Nation *vs.* Hitchcock, 187 U. S., 294.
> United States *vs.* Rickert, 188 U. S., 432.
> McKay *vs.* Kalyton, 204 U. S., 458.
>
> "Nor has citizenship prevented the Congress of the United States from continuing to deal with the tribal lands of the Indians."

This settled the question in so far as the case at bar is concerned, because in this case we are dealing only with the unallotted lands of the Cherokee Nation, and they are still tribal.

The Closing of the Rolls.

We have heretofore shown that the Secretary of the Interior by the authority of the act of March 3, 1901 (31 Stat., 1073), on January 15, 1902, fixed the date as of which the Cherokee roll should be made as July 1, 1902; that section 25 of the act of July 1, 1902 (32 Stat., 716), extended this date to September 1, 1902; and that section 2 of the act of April 26, 1906 (34 Stat., 137), as amended by the act of June 21, 1906 (34 Stat., 325), again extended the date as of which the roll should be made to March 4, 1906.

If Congress had the authority, and we contend that it had, to extend the time for the closing of the Cherokee roll by section 25 of the act of July 1, 1902, to September 1, 1902, then it also had the authority by section 2 of the act of April 26, 1906, as amended by the act of June 21, 1906, to extend the closing of the roll to March 4, 1906.

But it is urged that the act of July 1, 1902 (32 Stat., 716), was ratified by the Cherokee people and that it was an agreement. The Supreme Court held in the Cherokee Intermarriage cases (203 U. S., 76), commenting upon this same contention, as follows:

> "Counsel for claimants speak of the act of 1902 as a 'treaty,' *but it is only an act of Congress,* and can have no greater effect."

Even if the act of July 1, 1902, because it was ratified by a vote of the citizens of the Cherokee Nation, should be held to be an agreement, still the citizens have no vested rights to enrollment or to unallotted lands or tribal moneys, and Congress could have amended or repealed it whether it be construed as "only an act of Congress," an agreement, or a treaty (Cherokee Tobacco case, 11 Wall., 621; *Lone Wolf vs. Hitchcock,* 187 U. S., 553; *Thomas vs. Gay,* 169 U. S., 264).

Ratification of the act was only necessary because it was one of the conditions imposed by the act. But as decided in the case of *Lone Wolf vs. Hitchcock* (187 U. S., 553), Congress could have omitted the condition and no ratification would have been necessary, and the act would have been a valid exercise of power. Justice Stafford held that the provision was "unnecessary."

If the act of July 1, 1902, is "only an act of Congress," and by that act the time for closing the Cherokee roll extended from July 1, 1902, to September 1, 1902, why would not Congress by section 2 of the act of April 26, 1906, as amended by the act of June 21, 1906, have the authority upon the petition and at the request of the Cherokee Nation to further extend the time for the closing of the Cherokee roll to March 4, 1906? If Congress by act could extend the date for closing the roll to September 1, 1902, it could extend it, as it afterwards, on April 26, 1906, did, to March 4, 1906. In fact, it could have, in the first place, extended it to March 4, 1906, and if so, why did it not have the authority to so extend it by a subsequent act?

The Court of Claims in its opinion, *supra,* held that by virtue of the act of March 3, 1901, *supra:*

> "The Secretary of the Interior was authorized to and did fix the time for the enrollment as of July 1, 1902, which date was extended by said act of July 1, 1902, to September 1, 1902."

And, further commenting upon the power of Congress to extend the rate as of which the Cherokee roll should be made, held:

> "If they could, then, under the act of March 3, 1901, *supra,* they would have vested as of July 1, 1902, the date fixed by the Secretary of the Interior by authority of said act of 1901. But as before stated, the case here proceeds upon the theory of the validity of the extension to September 1, 1902."

In other words, if the act of April 26, 1906, as amended by the act of June 21, 1906, is unconstitutional because of the extension of the date as of which the Cherokee roll was to be made from September 1, 1902, to March 4, 1906, then the act of July 1, 1902, is also unconstitutional, because it extended the date as of which the roll should be made from July 1, 1902, to September 1, 1902, for the reason that, as above stated, this court held in the Intermarried White cases (203 U. S., 76) that said act of July 1, 1902, "is only an act of Congress and can have no greater effect."

Petitioners Only Represent Themselves and Cannot Maintain This Suit.

(1) The petitioners in this case do not represent the enrolled members of the Cherokee Nation. The total membership of the tribe consists of 41,798 citizens. The children born between September 1, 1902, and March 4, 1906, were enrolled at the request of the Cherokee tribe, and the tribe representd by its attorney employed as provided by section 28 of the act of April 26, 1906, *supra*, by contract with the Principal Chief of the tribe, approved by the President of the United States, appears on behalf of the tribe.

(2) The Cherokee Nation is and always has been recognized as a distinct political community (193 U. S., 127), and the National Council, elected by the people by an act approved September 28, 1905, and by joint resolution approved September 29, 1905, requested the enrollment of minor children born since September 1, 1902, and their enrollment was provided for at the request of the accredited representatives of the Cherokee Nation (44 C. Cls., 137).

(3) The history of Indian tribes in this country shows conclusively that all full-blood Indians are in favor of communal ownership so as to preserve homes for their posterity. This is particularly true of the Cherokee Indians. Section

2, article 1, of the Cherokee constitution provides that "the lands of the Cherokee Nation shall remain common property."

(4) The record in the case of Brown and Gritts (44 C. Cls., 283) and Intermarried White cases (203 U. S., 76) shows that the full-blood Cherokees were opposed to the enrollment and allotment of their tribal lands, and in fact were opposed to the passage of the allotment act of July 1, 1902, which is a direct contradiction of the contention that they desire the exclusion of their children in order that their individual shares may be increased, for in communal property all members of the tribe living at the date of its distribution are entitled to share equally.

(5) The records in the case of Muskrat and Dick *vs.* The United States (44 C. Cls., 137) show that the citizens of the Cherokee Nation are practically unanimous for the enrollment of these minor children, and in that case the Cherokee Nation filed an intervening petition and represented all of its citizens.

(6) The Cherokee Nation, anticipating that its tribal government would expire on March 4, 1906, as provided by the act of July 1, 1902, *supra,* and that all of its members, like the heirs of an estate, should share in the tribal property upon the date of the death of the nation, enacted the joint resolution of the National Council to which we have several times referred.

(7) We confidently reassert that history does not show that any full-blood Indians ever desired to acquire land or property to the exclusion of their minor children, and in this connection call attention to the following paragraph taken from the preamble of the memorial passed by the Cnickasaw Legislature November 23, 1905, and found in Appendix "B":

"Whereas the Chickasaw people believe that all children born to duly recognized citizens by blood of the Choctaw and Chickasaw nations, since the 4th day of March, 1905, and up to and including the 4th day of March, 1906, are members of the tribes and should be permitted to participate in the distribution of the lands belonging to the tribes."

And the body of the memorial petitions for the enrollment of:

"All children born to duly recognized citizens by blood of the Choctaw and Chickasaw nations since the 4th of March, 1905, and up to and including the 4th day of March, 1906 * * *."

And the memorial further asks that the children so enrolled be given an allotment of land and that they be permitted to participate in the distribution of the tribal funds. The first paragraph of the memorial gives as a reason for such a request that there will be a great number of acres of land left after the allotments shall have been completed to those citizens already enrolled.

(8) We challenge the right of these appellants to represent the members of the Cherokee Nation, or any of them, without the consent of the nation, over its protest and against its will.

(9) The petitioners have no authority to bring this suit against the Secretary of the Interior and Secretary of the Treasury to enjoin them from executing the act of April 26, 1906, as amended by act of June 21, 1906, because such suit is in effect a suit against the United States, and in the absence of any waiver on the part of the Government of immunity from suit the courts have no jurisdiction of such suits (*Naganab vs. Hitchcock*, 202 U. S., 473).

10. To restate our position upon the point of the right of appellants to maintain this suit:

(1) We insist that the title to the lands of the Cherokee Nation is in the tribe and not in the individuals (Cherokee Trust Funds case, 117 U. S., 288).

(2) That the title to the unallotted lands was not changed by the act of July 1, 1902 (32 Stat., 716), but the title to these surplus lands remains in the tribe and not in the individuals. Hayes *vs.* Barringer, 168 Fed., 221; Ligon *vs.* Johnson, 164 Fed., 670; Conley *vs.* Ballinger, 216 U. S., 84; Sac and Fox Indians, 45 C. Cls., 287; 220 U. S., 491.

(3) That appellants as individuals cannot maintain such a suit, and that the Government deals only with the tribe or nation and not with individuals was definitely settled by this court in the case of Blackfeather *vs.* The United States (190 U. S., 368). Upon the authority of the above case Mr. Justice Stafford in his opinion said:

> "The United States in such circumstances deals only with the tribe or nation, not with the individual Indian as vested with property rights."

The next to the concluding paragraph of his opinion is as follows:

> "If we had been disposed to hold otherwise upon the principal question it would have been necessary to have considered other objections to the bill, but as to these we expressed no opinion."

Which must have had reference to the right of petitioners to maintain this action.

(4) It has been held since the early case of Cherokee Nation *vs.* Georgia, reported in 5 Peters, 1:

> "That an Indian tribe or nation cannot maintain an action in the United States court on behalf of the tribe."

(5) If the title, as we insist, to the unallotted lands is in the nation and the nation itself cannot bring a suit with reference to these lands and funds, then it follows as a matter of course that no suit can be maintained by the individual citizens of that nation with respect to them. As was said by Mr. Justice Stafford:

> "The power of the United States to deal with the tribe or nation in respect to its tribal property cannot be questioned in the courts, the tribe or nation having no right to sue the United States without its consent."

11. Finally, we submit that Congress, having plenary power to administer upon tribal property, and that power being political and administrative in its nature, "the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."

Cherokee Nation *vs.* Hitchcock, 187 U. S., 294.

Previous Contention of Appellants Restated.

Heretofore appellants contended:

(1) That the act of July 1, 1902, dissolved the Cherokee tribe. The Supreme Court in the Marchie Tiger case, decided May 15, 1911, held:

> "Sec. 28 of the act provides for the continuance of the tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations, but places certain restrictions upon their right of legislation, making the same subject to the approval of the President of the United States."

In the opinion the court also held:

> "He (Marchie Tiger) was still a ward of the nation * * * and a member of the *existing Creek Nation.*" (Italics ours.)

This court in the case of Ballinger *vs.* Frost (216 U. S., 240), said:

> "The nations have not become extinct and are still residents on the land."

(2) That inasmuch as the act of March 3, 1901 (31 Stat., 1447), made the citizens of the Five Civilized Tribes also citizens of the United States, that it deprived Congress of the plenary power theretofore exercised over the tribal property of the Cherokee Nation. The court in the Marchie Tiger case, *supra,* held that making the Indians citizens of the United States did not condition the power of the Government over them or their tribal property; that they were still wards of the Government and subject to the plenary control by Congress.

(3) They insisted that the Cherokees held their lands by a different title from which lands are held by other tribal Indians. The court in the Marchie Tiger case, *supra,* was dealing with the lands belonging to the Creek Tribe of Indians, and they held their lands by the same kind of title as the Cherokees; and the court made no distinction between the power of Congress over the Creek Tribe of Indians and their lands and other tribal Indians.

(4) The only other question that has been insisted upon was that those Cherokees enrolled under the act of July 1, 1902, had a vested property right in and to the surplus lands and moneys remaining after allotments had been made to them. We insist that they have been overruled in this contention in the following cases:

Wallace *vs.* Adams (143 Fed. Rep., 716);
Wallace *vs.* Adams (204 U. S., 415);
Ligon *vs.* Johnston (164 Fed. Rep., 670);
Hayes *vs.* Barringer (168 Fed. Rep., 221);
Stephens *vs.* Cherokee Nation (174 U. S., 445);
Cherokee Nation *vs.* Hitchcock (187 U. S., 294);
Conley *vs.* Ballinger (216 U. S., 84; and
The Sac and Fox Indians (45 C. Cls., 287), 220 U. S., 481.

We submit that under the law and the facts, as set forth in the pleadings in this case, section 2 of the act of April 26, 1906, *supra*, as amended by the act of June 21, 1906, *supra*, should be held constitutional; that the relief prayed for should be denied, and the petition dismissed.

WILLIAM W. HASTINGS,
National Attorney for the Cherokee Nation.

APPENDIX A.

Opinion of Justice Stafford.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

In Equity. No. 29,926.

LEVI B. GRITTS, F. J. BOUDINOT, and RICHARD M. WOLFE, .. *Plaintiffs,*

vs.

WALTER L. FISHER, *Secretary of the Interior*, and FRANKLIN MACVEAGH, *Secretary of the Treasury, Defendants.*

Opinion of the Court.

MAY 9, 1911.

This case has been heard upon a demurrer to the bill, and will be disposed of without reference to any facts that have been brought upon the record by the return to the rule to show cause why a temporary injunction should not be issued, or otherwise. The plaintiffs rest their case upon the rights which they believe themselves to have acquired under and by virtue of the act of Congress of July 1, 1902, 32 Stat. at Large, chapter 1375, whereby they conceive themselves to be vested individually with property rights in certain lands and funds formerly belonging to the Cherokee Nation. They seek an injunction against the Secretary of the Interior to prevent him from disposing of such lands and against the Secretary of the Treasury to prevent him from disposing of such funds. Said Secretaries are proceeding and are about to proceed under a later act of Congress to dispose of the said property to others, and the position of the plaintiffs is that said latter act is unconstitutional and

void if and in so far as it attempts to authorize such disposition. The plaintiffs bring this bill in their own behalf and in behalf of all others having like interests. This in broad outline is the case presented by the bill, but it will be necessary to state the facts somewhat more particularly.

Before the passage of the act of 1902 the title to the property in question was vested in the Cherokee Nation for the common use and benefit of all its members, subject, of course, to the paramount authority of Congress. Cherokee Trust Funds, 117 U. S., 288; Constitution of the Cherokee Nation, art. 1, sec. 2. The individual members of the nation had no property rights therein that could be enforced by any legal proceedings. Cherokee Trust Funds, 117 U. S., 188; Stephens *vs.* Cherokee Nation, 174 U. S., 445; Cherokee Nation *vs.* Hitchcock, 187 U. S., 294; Cherokee Nation *vs.* Journeycake, 155 U. S., 196. The United States in such circumstances deals only with the tribe or nation, not with the individual Indians as vested with property rights. Blackfeather *vs.* U. S., 190 U. S., 368; Cherokee Trust Funds, 117 U. S., 288; Fleming *vs.* McCurtain, 215 U. S., 56. The power of the United States to deal with the tribe or nation in respect of its tribal property cannot be questioned in the courts, the tribe or nation having no right to sue the United States without its consent. Consequently the power of Congress in dealing with the tribe or nation in respect to its property is supreme and unlimited except by its own sense of justice and duty towards them. Lone Wolf *vs.* Hitchcock, 187 U. S., 553; Conley *vs.* Ballinger, 216 U. S., 84; Ligon *vs.* Johnston, 164 Fed., 670. Congress is not even bound to respect its own treaty stipulations with an Indian tribe. If it disregards or breaks such a stipulation it cannot be called to account therefor in the courts, and the constitutionality of its act cannot even be tested in the courts. The Cherokee Tobacco, 11 Wall., 616; Ward *vs.* Race Horse, 163 U. S., 504; United States *vs.* McBratney, 104 U. S., 621.

Much was said in argument on behalf of the plaintiffs

of the peculiar title by which the Cherokee Nation held its lands, and it was argued that its title was better than that of other Indian tribes in view of the history of the acquisition of the title and the terms of the treaties and acts of Congress relating thereto. But no matter what the title was which the United States had bestowed upon the Cherokee Nation in its political capacity, that title was not one that could be made the basis of an action in the courts against the United States or that could afford any standing ground upon which to contest the validity of an act of Congress dealing with the title. Thus much is clear from the cases already cited.

The act of 1902 provided for an allotment of lands of the Cherokee Nation among the individual members of the nation. The act was passed in response to a request from the nation. The stipulation in the treaty of 1866 had provided that upon such request the United States should at its own expense make such an allotment. But a request was not necessary. Congress could have made the allotment without any request; and could have ended the political existence of the Cherokee Nation with or without its consent. It chose to act upon the request, but its power was not limited thereby. The act of 1902 provided that it should not be of any validity until it had been ratified at an election by the legal voters of the Cherokee Nation. Section 74. But this was a provision that might have been omitted without affecting the constitutionality of the act. The act was ratified by the Cherokee Nation in accordance with this provision; but the constitutionality of the act is to be tested without reference to this unnecessary provision.

From the foregoing premises it necessarily follows that if the plaintiffs have any vested interest in the lands and funds in question it is purely by virtue of the act of 1902 itself, and because Congress intended by that act to vest them individually with the title to such lands and funds. To determine this question it will be necessary to examine the act with some care. It provided first for an appraise-

ment of the lands belonging to the Cherokee tribe of Indians in Indian Territory, except certain lands that were reserved from allotment. Section 9. The appraisement was to be made by the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior. Section 10. The Commission was to allot to each enrolled citizen of the tribe, land equal in value to one hundred and ten acres of the average allottable lands of the nation, liberty being allowed to each allottee to make his selection so as to include his improvements. Section 11. Each citizen was to be allowed to designate out of his allotment a certain portion as a homestead, and this homestead was to be inalienable for a certain period and non-taxable and not liable for debts contracted while so held by him. Section 13. None of the lands allotted to citizens were to be encumbered, taken or sold for debt, or to be alienated before the expiration of five years. Section 14. After ninety days from the ratification of the act it was to be unlawful for any member to enclose or hold possession of more lands in value than that of one hundred and ten acres of average allottable lands, and a breach of this provision was made a misdemeanor. Section 18. The roll was to be made up as of the first day of September, 1902, and if any enrolled person died subsequent to that date and before receiving his allotment, the lands to which he would have been entitled were to be allotted in his name and to descend to his heirs together with "his proportionate share of other tribal property." Section 20. The Commission was to issue allotment certificates and these were to be conclusive evidence of the right of the allottee to the tract therein described, and the United States Indian agent, under the direction of the Secretary of the Interior, was to put him in possession of his allotment and remove others therefrom. Section 21. There were twenty-three distinct reservations of lands. These were not to be allotted. Some of these were for townsites, others for cemeteries, others for school-houses and churches, and still others were railroad lands. Section 24. Provision was made for the en-

rollment of citizens in order to determine the membership of the tribe. The determinative day was to be September 1, 1902. All citizens living on that date were to be enrolled. Section 25. No child born thereafter was to be enrolled or be entitled to participate in the tribal property. Section 26. If any person so enrolled died prior to September 1, 1902, his right was to become extinguished and pass to the tribe in general. Section 31. If any person on the roll should die after the first day of September, 1902, the allotment was to be made in his name and descend to his heirs as before stated. Section 20. No person not so enrolled was to participate in the distribution of the common property, and those who were enrolled were to participate "in the manner set forth in this act." Section 31. The school fund was to be used under the direction of the Secretary of the Interior, and the moneys therefor were to be appropriated by the Cherokee National Council. Sections 32 and 34. Lands taken for highways, except those laid along section lines were to be paid for by the Cherokee Nation. Section 37. There was a provision for paying occupants of improved lands that should be taken for town sites out of the funds of the tribe—out of the funds arising from the town sites. Section 39. Persons in possession of town lots were to have the right to purchase on certain terms. Sections 41-43. Other lots in town sites were to be sold under the direction of the Secretary of the Interior. Sections 44-45. There were provisions for the payment of the committees of appraisement. Section 46. There were provisions for the location of cemeteries and the purchase thereof at the appraised value "for the benefit of the tribe." Section 49. Provision was made for the purchase of various other lots to be paid for by the purchasers into the same fund. The Secretary of the Interior was to furnish the Principal Chief with blank patents for all conveyances, and when any citizen should receive his allotment the chief should execute and deliver to him "a patent conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens,

in and to the lands embraced in his allotment certificate." Section 58. All conveyances were to be approved by the Secretary of the Interior, and such approval was to "serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent." Section 59. Any allottee accepting such patent was to be "deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in this act, and to relinquish all his right, title, and interest, to the same, except in the proceeds of lands reserved from allotment." Section 60. The patents were to be filed in the office of the Commission and there recorded. Section 62. It was provided that the tribal government should not continue longer than March 4, 1906. Section 63. The collection of all revenues of the tribe was to be made by an officer under the direction of the Secretary of the Interior. Section 64. All things necessary to carry into effect the provisions of the act, not otherwise specially provided for, were to be done under the direction of the Secretary of the Interior. Section 65. All funds of the tribe, including all moneys accruing under the provisions of the act, were to be paid out under the direction of said Secretary. Section 66. Said Secretary was to cause to be paid all just indebtedness of the tribe and all warrants drawn by authority of law, such payment to be made from any funds in the United States Treasury belonging to the tribe, and to be made in full before any disposition of any funds belonging to the tribe. Section 67.

As to certain lands in the vicinity of certain public institutions, provision was made for the appraisement of the improvements thereon and for the payment of the appraised value thereof into the Treasury of the United States "to the credit of the Cherokee Nation." Section 71. The citizens receiving allotments were given certain restricted rights to lease their lands, and it was provided that when cattle were grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners of

the cattle a grazing tax "for the benefit of the tribe." Section 72. Any act of Congress or treaty provision inconsistent with the act, with one exception, which does not concern us now, was declared to be of no further force. Section 73. The act was not to take effect until ratified at an election by the Cherokee Nation, as before stated. Section 74. Finally, provision was made for the election and for proclaiming the result thereof and for certifying the result to the President of the United States.

From this résumé it will appear that the act contemplated an allotment of all the lands of the nation outside of the reservations, each citizen to receive the equivalent of one hundred and ten acres of the average allottable lands. But inasmuch as the roll had not been made up at the time of the passage of the act, it was impossible to know exactly the number of the citizens. The allotment of one hundred and ten acres must have been made in the belief that it would leave a safe margin so that each citizen might receive his allotment. No provision was made, however, for any further allotment of any lands that might remain after the allotment provided for by the act. Some thirty-eight thousand Cherokees were enrolled under this act, and it turned out that there were several thousand acres of land outside the reservations that were not allotted and were not required for allotment in order to give each enrolled Cherokee his one hundred and ten acres, or the equivalent thereof. It is as to these surplus acres that the question arises so far as the question relates to lands. Where was the title to these surplus acres after the allotment was completed? Did it rest in the individuals whose names were on the roll as tenants in common, or did it rest in the Cherokee Nation for the benefit of all its citizens, who were, of course, as the law then stood, under the act of 1902, the persons whose names were upon the roll? As to the funds, both those already in existence and those to be realized under the provisions of the act, the question also arises whether they belonged to the individuals whose names were upon the roll

or to the nation for the benefit of all its citizens. It will be noticed that the act refers to these funds as belonging to "the tribe." That appears in several sections of the act. The only expression that might refer to the surplus acres is the phrase "other tribal property" in section 20, which provides for the descent to the heirs of an enrolled Cherokee of his "allotment * * * with his proportionate share of other tribal property" in case of his death subsequent to the first day of September, unless possibly we should treat the expression in section 31 as including the surplus acres. That section is the one which provides that no person whose name does not appear upon the roll shall be entitled to participate "in the distribution of the common property of the Cherokee tribe," and that those whose names do appear thereon "shall participate in the manner set forth in this act." But "the manner set forth in this act" does not include any provision for dividing up the surplus acres. If Congress intended that the surplus funds should be tribal property it is highly probable that it intended that the surplus acres should also be tribal property. To leave the ownership of several thousand acres in 38,000 individual owners, requiring the joinder of all in any conveyance thereof and entitling each to a partition in a court of equity, is a thing which it is not likely that Congress intended to do. Other legislation with respect to these lands must have been contemplated. Moreover, the act contemplates the continuance of the tribal government until March 4, 1906, when it might reasonably be expected that the property affairs of the tribe would be wound up, and by subsequent acts Congress made clear its intention to keep the tribal government alive until the property affairs were disposed of; for by joint resolution of March 2, 1906, 34 Stat. at Large, 822, it was declared that the tribal government should be "continued in full force and effect for all purposes under existing laws until all property of such tribe or the proceeds thereof shall be distributed among the individual mem-

bers." And by act of April 26, 1906, 34 Stat. at Large, 148, section 28, the tribal government was continued until "otherwise provided by law." No question arises in this case touching the right of the enrolled citizens to their several allotments of lands under the provisions of the act of 1902. For the purposes of this case their right in and to those allotments may well be taken as vested, and not to be affected by any subsequent legislation. The question here relates solely to the title to the surplus acres, as to which there is no provision for allotment under the act of 1902, and to the funds that should remain after due administration thereof by the Secretary of the Interior. There is no express provision that the enrolled citizens shall be tenants in common, so to speak, of the surplus funds, but it was evidently contemplated by the act that they would be entitled to a pro rata division of these by virtue of their citizenship. Section 31. Of course they would be so entitled if they remained the only citizens upon the roll. But as to all this property, both the surplus acres and the surplus funds, it is quite plain that the right of the enrolled citizens was by virtue of their citizenship. The title still rested in the Cherokee Nation, whose existence was carefully and purposely continued until such time as an actual division should be made.

But if it were not perfectly plain that Congress intended to retain its power of dealing with the tribe as such, and of disposing of its property as it believed the welfare of the tribe required, we should not be justified in adopting the opposite view. The court should indulge a strong presumption in favor of such a retention of power, for we are not lightly to conclude that Congress intended to abandon it. Plenary power over the tribes and their property has been exercised by Congress from the beginning, restrained only by its sense of moral obligation; and we should not be justified in holding that the power had been parted with, unless the act made it perfectly plain that such was the intention of Congress. Wheeling and Belmont Bridge Co. *vs.* Wheeling Bridge Co., 138 U. S., 287; U. S. *vs.* Herron, 20 Wall., 261; U. S. *vs.* Rickit, 188 U. S., 432.

We come now to the acts of 1906 under which the defendants are proceeding. Several years having elapsed and the allotments having been made under the act of 1902 and there remaining surplus lands and undistributed funds to a large amount, and there having been born into the tribe more than five thousand children, it was considered by Congress that these children ought in justice to be enrolled and to receive allotments of land or funds in lieu of land, to equalize their condition with that of the members who had been enrolled as of the first day of September, 1902. The case is now being disposed of upon demurrer to the bill and consequently we do not consider the claim of the defendants that the acts of 1906 were passed at the request of the Cherokee National Council. In the view we are taking of the law that fact would be immaterial, but in any event, it cannot be considered in determining the sufficiency of the bill, for it is not alleged in the bill. By the act of April 26, 1906, 34 Stat. at L., chapter 1876, section 2, it was provided that for ninety days after the approval of the act applications should be received for enrollment of children who were minors living March 4, 1906, whose parents had been enrolled as members of the Cherokee tribe, or had application for enrollment pending at the approval of the act, and that allotments should be made to children so enrolled. It further provided that if any citizen of the Cherokee tribe should fail to receive the full quantity of land to which he would be entitled under the allotment, he should be paid out of any funds of the tribe a sum equal to twice the appraised value of the lands thus deficient. The contention of the plaintiffs is that these provisions are unconstitutional and void, as depriving them of vested property rights under the act of 1902. The provision amounts to an enlargement of the definition of citizenship. The plaintiffs and the other citizens enrolled as of September 1, 1902, were declared by the act of 1902 to be the citizens and all the citizens of the Cherokee Nation. Congress had undoubted power to make

this declaration, to define who should be citizens, and to determine who were citizens in fact. It was a legislative power inherent in Congress by virtue of its supreme authority over the tribe and its property. The fact that certain property rights were attached to citizenship did not impair its power. Wallace *vs.* Adams, 204 U. S., 415; Stephens *vs.* Cherokee Nation, 174 U. S., 445.

This legislative power was not exhausted by the exercise of it in 1902. Congress still had authority to modify its definition of citizenship, or to change its method of determining who were citizens in fact. It was still dealing with the tribe, and until individual property rights had become vested, it had the power which all legislatures have to alter and amend the law. We have already pointed out the reasons which require us to hold that the enrolled citizens were not vested as individuals with property rights in the surplus acres and funds. If we are right in so holding, the only ground of complaint which the plaintiffs can have is that Congress has enlarged the roll of citizens and has thereby diminished their proportionate shares of tribal property. But their right to tribal property by virtue of citizenship is not a vested property right which they can enforce individually. Such a right is derivative, and depends upon the right of the tribe. It cannot be greater than the right of the tribe itself, and that right is subject to the paramount authority of Congress. Hayes *vs.* Barringer, 168 Fed., 221; Conley *vs.* Ballinger, 216 U. S., 84; Fleming *vs.* McCurtain, 215 U. S., 56.

By act of March 1, 1907, 34 Stat., at L., 1015, 1028, Congress attempted to authorize William Brown and Levi B. Gritts on their own behalf and on behalf of all other Cherokee citizens having like interests, to institute suits in the Court of Claims to determine the validity of the acts here in question. Such suits were brought and the question was determined by the Court of Claims in favor of the validity of the acts. On appeal to the Supreme Court of the United

States, it was held that the act thus attempting to confer jurisdiction on the Court of Claims was ineffective as providing only for the decision of an abstract, moot, question; wherefore the opinion of the Court of Claims cannot be considered as a judicial decision. Nevertheless, having examined the question independently, it is gratifying and reassuring to know that other minds impartially and thoroughly examining the same question have arrived at the same conclusion. 44 Ct. of Claims, 137.

If we had been disposed to hold otherwise upon the principal question it would have been necessary to have considered other objections to the bill, but as to these we express no opinion.

The result is that the demurrer must be sustained and the bill adjudged insufficient. The rule to show cause why a temporary injunction should not issue must be discharged and the restraining order heretofore issued must be dissolved.

By the court:

WENDELL P. STAFFORD, *Justice.*

EXHIBIT "B."

59th Congress, 1st Session. } HOUSE OF REPRESENTATIVES. { Document No. 455.

ENROLLMENT OF CHILDREN OF CHICKASAW AND CHOCTAW PARENTS.

Letter from the Secretary of the Interior, Transmitting

A Memorial of the Chickasaw Legislature Relative to the Enrollment of Children of Chickasaw and Choctaw Parents; also Papers Relating to New-born Children of Citizens of the Five Civilized Tribes.

January 31, 1906.—Referred to the Committee on Indian Affairs and ordered to be printed.

SECRETARY'S OFFICE,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *January* 31, 1906.

SIR: I have the honor to transmit herewith, for such action as is deemed proper, a copy of a memorial to Congress of the Chickasaw legislature, approved by the governor of the nation November 23, 1905, relative to the enrollment of children born to duly recognized citizens by blood of the Choctaw and Chickasaw nations since March 4, 1905; also a copy of Indian Office letter of January 24, 1906, submitting the memorial to the Department, in which attention is called to a portion prepared in this Department, of H. R. 5976, relative to new-born children of citizens of the Five Civilized Tribes, and which fixes March 4, 1905, as the date after which no child born to such citizens shall be enrolled.

Respectfully,

T. A. HITCHCOCK, *Secretary.*

The Speaker of the House of Representatives.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *January* 24, 1906.

SIR: There is inclosed a report from Inspector Wright, dated January 11, 1906, transmitting a memorial of the legislature of the Chickasaw Nation, approved by the governor on November 23, 1905, entitled "A memorial relative to the enrollment of children born to duly recognized citizens by blood of the Choctaw and Chickasaw nations since March 4, 1905."

The memorial is as follows:

> "Whereas there will be a great number of acres of land unallotted in the Choctaw and Chickasaw nations after all of the regularly enrolled citizens of said nations have taken their allotments, which residue lands, under existing laws and treaties, will be sold and the proceeds distributed per capita among the citizens of the said two nations; and
>
> "Whereas the Chickasaw people believe that all children born to duly recognized citizens by blood of the Choctaw and Chickasaw nations since the 4th day of March, 1905, and up to and including the 4th day of March, 1906, are members of the tribes and should be permitted to participate in the distribution of the lands belonging to the tribes:
>
> "Therefore, we, the members of the senate and the house of representatives of the Chickasaw Nation in legislature assembled, respectfully request the Congress of the United States, at an early date, to enact suitable laws directing the Commissioner to the Five Civilized Tribes to enroll all children born to duly recognized citizens by blood of the Choctaw and Chickasaw nations since the 4th day of March, 1905, and up to and including the 4th day of March, 1906, or up to the expiration of the Choctaw and Chickasaw governments, and for this alone; further, that such

> children be permitted to take in allotment, of the residue lands, land equal in value to three hundred and twenty acres of average allottable land of the said nations; and that they be permitted to participate equally with the other members of the tribes in the final distribution of the funds belonging to said tribes."

Inspector Wright says that the memorial does not seem to require Executive action; that he understands the subject has received departmental consideration, and that proper legislation has been recommended to Congress. He suggests that the memorial be transmitted to Congress with such recommendation as the Department may consider proper, and that the tribal authorities of the Chickasaw Nation be so advised.

Section 2 of H. R. 5976, entitled "A bill to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," provides that—

> "For ninety days after approval hereof applications may be received for enrollment of children who were minors living March fourth, nineteen hundred and five, whose parents have been enrolled in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, or have applications for enrollment pending at the approval hereof,"

and declares the allotments shall be made "to children so enrolled."

The act of March 3, 1905 (33 Stats., 1048), authorized the Commission to the Five Civilized Tribes for sixty days after the date of the approval thereof to receive and consider applications for enrollment of infant children born subsequent to September 25, 1902, and prior to March 4, 1905, "and who were living on said latter date," to citizens

by blood of the Choctaw and Chickasaw tribes whose enrollment had been approved by the Department prior to the date of the approval of the act, and to enroll and make allotments to such children, and I assume that the framers of H. R. 5976 adopted March 4, 1905, as the date after which no children born to recognized and enrolled citizens of the Choctaw and Chickasaw nations should be enrolled because Congress had fixed that as the date.

The memorial does not seem to require Executive action, and it is respectfuly submitted.

Very respectfully,

C. F. LARRABEE,
Acting Commissioner.

The Secretary of the Interior.

"A Memorial Relative to the Enrollment of Children born to Duly Recognized Citizens by Blood of the Choctaw and Chickasaw Nations since March 4, **1905.**

"Whereas there will be a great number of acres of land allotted in the Choctaw and Chickasaw nations after all of the regularly enrolled citizens of said nations have taken their allotments, which residue lands, under existing laws and treaties, will be sold and the proceeds distributed per capita among the citizens of the said two nations; and

"Whereas the Chickasaw people believe that all children born to duly recognized citizens by blood of the Choctaw and Chickasaw nations since the 4th day of March, 1905, and up to and including the 4th day of March, 1906, are members of the tribes and should be permitted to participate in the distribution of the lands belonging to the tribes:

"Therefore, we, the members of the senate and the house of representatives of the Chickasaw Nation in

legislature assembled, respectfully request the Congress of the United States, at an early date, to enact suitable laws directing the Commissioner to the Five Civilized Tribes to enroll all children born to duly recognized citizens by blood of the Choctaw and Chickasaw nations since the 4th day of March, 1905, and up to and including the 4th day of March, 1906, or up to the expiration of the Choctaw and Chickasaw governments, and for this alone; further, that such children be permitted to take in allotment, of the residue lands, land equal in value to 320 acres of average allotable land of the said nations; and that they be permitted to participate equally with the other members of the tribes in the final distribution of the funds belonging to said tribes.

"Recommended by G. V. Young.

"Passed the house this 23d day of November, 1905.

"C. H. BROWN, *Speaker.*

"F. O. SMITH,

"Clerk pro Tempore.

"Passed the senate this 23d day of November, 1905.

"M. V. CHEADLE, *President.*

"O. D. WHITE, *Secretary.*

"Approved this 23d day of November, 1905.

"D. H. JOHNSTON, *Governor.*"

GRITTS *v.* FISHER, SECRETARY OF THE INTERIOR, AND MACVEAGH, SECRETARY OF THE TREASURY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 896. Argued January 10, 11, 1912.—Decided May 13, 1912.

Children born to enrolled members of the Cherokee tribe after September 1, 1902, and living on March 4, 1906, are entitled to enrollment as members of the tribe and to participation in the allotment and distribution of its lands and funds made under the act of July 1, 1902, 32 Stat. 725, c. 1375, and subsequent acts relating to such allotment and distribution.

Section 2 of the act of April 26, 1906, as amended June 21, 1906, for the enrollment of minor children living March 4, 1906, is not to be construed as excluding those born after September 1, 1902.

Under the act of July 1, 1902, individual members of the Cherokee tribe did not individually acquire any vested rights in the surplus lands and funds of the tribe that disabled Congress from thereafter making provision for admitting newly-born members of the tribe to the allotment and distribution, as it did by the act of April 26, 1906.

The act of July 1, 1902, limiting the allottees and distributees of Cherokee lands and funds, was not a contract but only an act of Congress and can have no greater effect; it was but an exertion of the governmental administrative control over tribal property of tribal Indians, and subject to change by Congress at any time before it was carried into effect and while tribal relations continued.

37 App. D. C. 473, affirmed.

THE facts, which involve the construction and validity of the statutes relating to allotment and distribution of Cherokee lands and funds and the right of children born after September 1, 1902, to participate therein, are stated in the opinion.

Mr. John J. Hemphill and *Mr. W. H. Robeson*, with whom *Mr. C. C. Calhoun* and *Mr. Daniel B. Henderson* were on the brief, for appellants.

The Solicitor General for appellees.

Mr. William W. Hastings, as *amicus curiæ*, filed a brief for the Cherokee Nation.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

The question presented for decision in this case is, whether children born to enrolled members of the Cherokee tribe of Indians after September 1, 1902, and living on March 4, 1906, are entitled to enrollment as members of the tribe and to participation in the allotment and distribution of its lands and funds now being made under the legislation of Congress. The Secretary of the Interior and the Secretary of the Treasury, who are respectively charged with important duties in that connection, have taken the position, and are proceeding upon the theory, that under the acts of April 26, 1906, and June 21, 1906, *infra*, the right of the controversy is with the children; and the purpose of this suit is to test the accuracy of that position, and, if it be held untenable, to enjoin those officers from giving effect to it. The suit was begun in the Supreme Court of the District of Columbia in 1911, and the plaintiffs are three Indian members of the tribe, duly enrolled as such as of September 1, 1902, under the act of July 1,

1902, *infra*, who sue on behalf of themselves and all others similarly situated. A demurrer to the bill was sustained and a decree of dismissal entered, which was affirmed by the Court of Appeals. 37 App. D. C. 473; 39 Wash. Law Rep. 754. An appeal brought the case here.

During the last twenty years Congress has enacted a series of laws looking to the allotment and distribution of the lands and funds of the Five Civilized Tribes, of which the Cherokee tribe is one, among their respective members, and to the dissolution of the tribal governments. An extended statement of these laws, so far as they concern the Cherokees, as also of the title by which their lands and funds have been held and of the relations of the tribe and its members to the United States, will be found in *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Cherokee Intermarriage Cases*, 203 U. S. 76; *Lowe* v. *Fisher*, 223 U. S. 95, and *Heckman* v. *United States*, *ante*, p. 413.

Anterior to this legislation the lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was not alienable or descendible. And when children were born into the tribe they became thereby members and entitled to all the rights incident to that relation. Under treaties with the United States the tribe maintained a government of its own, with legislative and other powers, but this was a temporary expedient and in time proved inefficient and unsatisfactory. As in the instance of other tribal Indians, the members of this tribe were wards of the United States, which was fully empowered, whenever it seemed wise to do so, to assume full control over them and their affairs, to determine who were such members, to allot and distribute the tribal lands and funds among

them, and to terminate the tribal government. This Congress undertook to do. The undertaking was a large one and difficulties were encountered. The first legislation was largely preliminary and experimental and need not be specially noticed, because no material change in the situation resulted therefrom.

The act of July 1, 1902, 32 Stat. 725, c. 1375, which related only to the Cherokees and is spoken of as the Cherokee Agreement, was quite comprehensive and is the one upon which the plaintiffs here rely. It made provision for ascertaining who were members and permanently enrolling them (§§ 25–30), for reserving certain of the tribal lands for public purposes (§ 24), for appraising the other lands (§§ 9, 10), and for allotting in severalty to each enrolled member land equal in value to 110 acres of the average allottable lands (§ 11). It declared that the enrollment should be made "as of September 1, 1902," and should include "all persons then living" and entitled to enrollment (§ 25); that "no child born thereafter" should be entitled to enrollment or "to participate in the distribution of the tribal property" (§ 26); that during the months of September and October, 1902, applications could be received for the enrollment of infant children born to recognized and enrolled members on or before September 1 of that year, but that the application of no person whomsoever for enrollment should be received after October 31, 1902 (§ 30); that no person not enrolled should be entitled to "participate in the distribution of the common property" of the tribe, and those who were enrolled should "participate in the manner set forth" in the act (§ 31); that the enrollment should be made in partial lists, which, when approved by the Secretary of the Interior, were to constitute parts of the final roll "upon which allotment of land and distribution of other tribal property" should be made, and that when lists embracing all persons lawfully entitled to enrollment were

made and approved the roll should "be deemed complete" (§ 28). There were provisions, that "no allotment of land or other tribal property" should be made on behalf of any enrolled person dying *prior* to September 1, 1902, but that his right in the lands or other tribal property should be deemed extinguished (§ 31), and that if any enrolled person should die *after* September 1, 1902, and before receiving his allotment, the lands to which he would have been entitled if living should be allotted in his name and should, "with his proportionate share of other tribal property," descend to his heirs (§ 20). The act declared that the tribal government should not continue longer than March 4, 1906 (§ 63), directed the payment in full, out of the tribal funds, of the lawful indebtedness of the tribe incurred up to the time of its dissolution, and authorized a *pro rata* distribution, among the enrolled members, of the tribal funds remaining after the dissolution of the tribal government and the payment of its indebtedness (§§ 66, 67). But it made no specific provision for the distribution or disposal of tribal lands remaining after the prescribed reservations and allotments were made.

But the tribal government was not dissolved on March 4, 1906. By joint resolution of March 2, 1906, Congress provided that the tribal existence and the tribal government should continue until all property of the tribe, or the proceeds thereof, should be distributed among the individual members (34 Stat. 822); and by the act of April 26, 1906, they were further continued until otherwise provided by law (34 Stat. 137, 148, c. 1876). On those dates the work contemplated by the act of July 1, 1902, had not been completed. Some of the applications for enrollment, received within the time prescribed in the act, had not been acted upon; some of the enrolled members had not selected their allotments, and litigation was pending which involved the rights of some who had been enrolled and of others whose applications were awaiting

action. In addition to this, some who otherwise were entitled to enrollment had filed applications therefor after the time prescribed, and the tribal council of the Cherokees had requested that children born after September 1, 1902, and before March 4, 1906, who but for the limitation in the act of July 1, 1902, would be entitled to participate in the allotment and distribution of the tribal lands and moneys equally with members born prior thereto, be admitted to such participation, if possible, and if that could not be done, that each child born between those dates be given a sum of money sufficient to place him, as far as possible, on an equal footing with the others.

The act of April 26, 1906, unlike that of July 1, 1902, was not limited to the Cherokees, but it did in express terms include them. By its twenty-eighth section it continued the tribal existence and the tribal government, as just indicated; by its first section it authorized the enrollment of a class of persons whose applications therefor were made prior to December 1, 1905, and were not allowed solely because not made in time; and by its second section, as amended June 21, 1906, 34 Stat. 325, 341, c. 3504, it provided as follows:

"That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. . . . *Provided,*

That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment or to be entitled to enrollment in any of said tribes, except for minors the children of Indians by blood, or of freedmen members of said tribes, . . . as herein otherwise provided. . . ."

By its sixteenth and seventeenth sections it further provided that after the making of the allotments provided for in that and other acts, the residue of the lands, not reserved or otherwise disposed of, should be sold by the Secretary of the Interior and the proceeds deposited in the United States Treasury to the credit of the tribe, together with moneys arising from other sources, and that thereafter, and when all the just charges against the tribal funds should be deducted therefrom, the remaining funds should be distributed per capita to the members then living and to the heirs of deceased members named in the finally approved rolls.

The controversy here arises out of the provision in § 2 of the act of April 26, 1906, as amended June 21 following, for the enrollment of "children who were minors living March 4, 1906," which the defendants regard as including children born after September 1, 1902, and living on March 4, 1906. The appellants contend, first, that it does not include children born after September 1, 1902, but only such as were born prior to that date and for whom no application for enrollment was made within the time limited by the act of July 1, 1902, that is, on or before October 31, 1902; and, second, that if it does include children born after September 1, 1902, it arbitrarily takes from the appellants and others similarly situated property

which is theirs and gives it to others, and therefore is violative of due process of law. The last contention rests upon another, viz., that the act of July 1, 1902, vested in the members living on September 1, 1902, who were enrolled under that act, an absolute right to receive all lands of the tribe not reserved or allotted thereunder and all funds of the tribe not used in the payment of tribal debts.

We are unable to assent to the first contention. The provision in question says "children who were minors living March 4, 1906," and those words as naturally and aptly embrace children born after as before September 1, 1902. Had it been intended, as is claimed, merely to extend the time for filing applications on behalf of children living on September 1, 1902, and therefore born on or before that date, it is reasonable to believe that other words more appropriate to the occasion would have been used. Why say "living March 4, 1906," if as to these children the prior requirement expressed in the words "living on September 1, 1902," was not to be affected? Besides, the Cherokee tribal council, as also the Chickasaw legislature (see H. R. Doc. No. 455, 59th Cong., 1st Sess.), had asked that provision be made for the enrollment of children born up to March 4, 1906, and that would shed some light on the provision were its meaning uncertain. But it does not seem to have been regarded as uncertain by those charged with its enforcement, nor by the courts below. On the contrary, they treated it as plainly including children born after September 1, 1902, and we think that is the right view of it.

We come then to the second contention. It is not proposed to disturb the individual allotments made to members living September 1, 1902, and enrolled under the act of 1902, and therefore we are only concerned with whether children born after September 1, 1902, and living on March 4, 1906, should be excluded from the allotment and distribution. The act of 1902 required that they be

excluded, and the legislation in 1906, as we have seen, provides for their inclusion. It is conceded, and properly so, that the later legislation is valid and controlling unless it impairs or destroys rights which the act of 1902 vested in members living September 1, 1902, and enrolled under that act. As has been indicated, their individual allotments are not affected. But it is said that the act of 1902 contemplated that they alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage Cases*, 203 U. S. 76, 93. It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued. *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Wallace* v. *Adams*, 204 U. S. 415, 423. It is not to be overlooked that those for whose benefit the change was made in 1906 were not strangers to the tribe, but were children born into it while it was still in existence and while there was still tribal property whereby they could be put on an equal, or approximately equal, plane with other members. The council of the tribe asked that this be done, and we entertain no doubt that Congress in acceding to the request was well within its power.

Decree affirmed.